2023

PVL 3702

LAW OF CONTRACT

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PVL 3702 – LAW OF CONTRACT -2023 MAY EXAM

QUESTION 1

ABC company advertises that they have manufactured a patent medicine. The advert states that if this medication is taken, by any person, according to the manufacturer's prescription, that person will not become ill with the coronavirus sickness. And the advert further states that the company is so confident of this medication, that if anyone does get sick with this virus, after taking the medication as prescribed, the company will pay that person R50 000. Based on this advertisement, Y purchased the medication, and he took the medication as prescribed by the manufacturer (ABC company). Unfortunately for Y, he still fell ill with the coronavirus. Y approaches you for legal advice as he wants to institute legal proceedings against ABC company. **Advise Y if a legally binding contract was concluded between him and ABC company. Discuss fully and refer to case law in your answer. Do not apply the Consumer Protection Act 68 of 2008. Your answer must not exceed two typed pages or three written pages. [25]**

Identifying the problem

Y will only be successful in her claim if a valid contract arose between ABC company and Y, and this will be the case if there was a valid offer and acceptance. Was there a valid offer and acceptance?

Relevant Legal Principles

Requirements for a valid offer and acceptance

1.1 The offer must be firm

The offer must be a firm one, made animo contrahendi – that is to say, with the intention that its acceptance will call into being a binding contract. This requirement is not fulfilled if one of the parties makes a tentative statement to the other with the intention of sounding the other out in order to find out whether he or she would be prepared to enter into negotiations (Efroiken v Simon 1921 CPD 367). Whether a particular declaration amounts to a firm offer, or is merely a tentative indication of willingness to do business, may not always be easy to determine

1.2 The offer must be complete

The offer must contain all the material terms of the proposed agreement – there cannot be further matters that still have to be negotiated before the overall agreement can take effect (OK Bazaars v Bloch 1929 WLD 37; Lambons (Edms) Bpk v BMW (Suid Afrika) (Edms) Bpk 1997 (4) SA 141 (SCA)).

1.2 The offer must be clear and certain

The offer must be sufficiently certain; it should be enough for the addressee merely to answer 'Yes', for a contract to come into being. If the offer is so vague that it fails to provide a reasonably clear indication of what the offeror has in mind, no acceptance of the offer can create a binding obligation, because it will be impossible to determine the content of that obligation.

In our case, the offer was firm, complete, clear, and certain. The offer can therefore be said to have been valid.

Applying the principles to the facts :

The providing of information by Y was a valid acceptance of ABC's offer:

• Y's acceptance was unqualified

• Y, as a member of the public to whom the offer was made, may accept (offer may only be accepted by offeree – Bird v Summerville)

• Y 's acceptance was a conscious response to the offer (he knew of the offer and could thus accept it – unlike the situation of Bloom v American Swiss where the plaintiff returned the item but was unaware there was a reward for doing so).

Conclusion
It can be concluded that a valid contract arose in this problem, because ABC made a valid offer, which Y validly accepted.

QUESTION 2

X takes his motor vehicle to Sporty Motors for a service. On his arrival, he is asked to sign a "job card" by the owner. X enquires why he is required to sign the "job card" and the owner explains to him that by signing he is authorising them to conduct the service on his car which will cost R10 000. He signs the "job card" without reading it. While servicing the car, the service manager finds faults on the car (unrelated to the service) and he proceeds to do these additional repairs for a further R8 000. X refuses to pay for the additional repairs and argues that he did not authorise such repairs. The owner of Sporty Motors argues that X is obliged to pay for the work done as the "job card" contains a contractual clause authorising Sporty Motors to do any repairs on the motor vehicle which they deem necessary without asking for the client's authorisation and the client becomes liable to pay for the repairs in terms of this clause. **Advise X on whether he is contractually liable to pay Sporty Motors R8 000 for the additional repairs. Discuss fully and refer to case law in your answer. Do not apply the Consumer Protection Act 68 of 2008**. **Your answer must not exceed two typed pages or three written pages.** **[25]**

Identifying the problem

The essence of this problem is the question whether X and the owner of Sporty Motors have reached actual consensus or ostensible consensus. X will not be contractually bound to pay for the R10 000 service if this requirement for a valid contract is absent.

relevant law applicable to the problem

At the outset it must be determined whether agreement (consensus ad idem) as a contractual basis exists between the parties, as required in terms of the will theory. Consensus has three elements .The parties must seriously intend to contract, be of one mind as to the material aspects of the proposed agreement (the terms and the identity of the parties to it), and be conscious of the fact that their minds have met.

In the present case the parties were not in agreement as to the consequences they wished to create: X thought that he was authorising Sporty Motors to only service his car, while the owner of Sporty Motors knew that the contract also allowed Sporty Motors to conduct repairs on the car for which they deem necessary and payable by X without any further authorisation from X. This is a mistake as to the obligations the parties wished to create and is a material mistake which excludes consensus between the parties. This means that no contract could arise on the basis of the will theory for both the service of the car and the additional repairs. This type of mistake can be illustrated with a number of cases.

In George v Fairmead (Pty) Ltd 1958 (2) SA 465 (A) the appellant signed a hotel register without reading it. The hotel register contained a term excluding the respondent from liability for certain acts. The appellant was unaware of this term and his mistake related to a term which he believed would not be in the contract and as such was material because it related to an aspect of performance.

In Allen v Sixteen Stirling Investments (Pty) Ltd 1974 (4) SA 164 (D) the mistake related to performance and was thus material. The plaintiff believed that he was purchasing the erf shown to him by the seller's agent, while the written contract that he signed indicated the correct erf which was a completely different property. His mistake related to performance and was material. See also in Du Toit v Atkinson's Motors Bpk 1985 (2) SA 889 (A), the appellant signed an agreement containing a term excluding the respondent from liability for misrepresentation. Finally see Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis 1992 (2) SA 234 (A) where the appellant erred with regard to the period of the lease which was an aspect of the performance and thus material.

Direct Approach

With reference to the direct approach, contractual liability is based on the reasonable reliance that consensus has been reached which the one contractant (contract denier) creates in the mind of the other contractant (contract enforcer).

According to the Sonap case the direct reliance approach entails a threefold enquiry:

Was there a misrepresentation regarding one party's intention? Because X is now disputing liability to pay Sporty Motors R10 000, it appears that by signing the contract X made a misrepresentation that he would be bound to pay Sporty Motors once the service to his car is completed. Who made the misrepresentation? In the problem it was made by a party to the contract, X. Was the other party actually misled by the misrepresentation and, if so, would a reasonable man also have been misled? Sporty Motors was misled and a reasonable man would also have been misled to think that by signing the card, X was authorising the service to be done. This is the case as X was told that by signing the "job card", he is authorising Sporty Motors to conduct the service on his car, at a cost of R10 000.

In our problem X did create a reasonable reliance that he wished to be bound contractually for the sum of R10 000. In any event, if X was not contractually bound, he may nevertheless be liable to pay this amount to Sporty Motors, based on an unjustified enrichment claim.

X is not contractually liable to pay R8000 for the additional repairs because he could not have expected the relevant term to be in the contract (based on the correct application of the above three fold enquiry set out in the Sonap case). However, this does not exclude the possibility that X may be liable for unjustifiable enrichment for R8 000, for the additional repairs.

Conclusion
X is bound by an agreement to pay Sporty Motors R10 000 for the service conducted on his motor vehicle. This is based on actual and/or apparent consensus.

QUESTION 3

D and E concluded a contract for D to manufacture cable trays for an electrical support system, for R100 000. The parties agreed to certain strict specifications that D will use to manufacture the cable trays. When D completed the manufacturing process and delivered the cable trays to E, E noticed that the cable trays did not completely comply with the strict specifications both D and E agreed to. E nevertheless decided that he can still use the cable trays, and E contracted with Z to make a minor adjustment to the cable trays to ensure that the cable trays comply with the strict specifications required. E paid Z R20 000 for the work Z did. **E refuses to pay any money to D for the work done by D. Advise D if he can recover any amount from E, and if so, on what basis. Discuss fully and refer to case law.** Note that E does not commit breach of contract by refusing to pay D. **Do not apply the Consumer Protection Act 68 of 2008**. **Your answer must not exceed two typed pages or three written pages. [25]**

This contract is reciprocal in nature. D has rendered defective performance and the issue is whether E has to compensate D for the work that has already been done.

This question deals with the exceptio non adimpleti contractus. The exceptio is a defence that can be raised in the case of a reciprocal contract, where the performances due on either side are promised in exchange for one another. It is a remedy that permits a party to withhold their performance and ward off a claim for such performance until such time as the other party has either performed or tendered performance of their obligations.

Where a party who has to perform first has only performed part of its obligations or has rendered defective performance, that party is in principle not entitled to claim counter-performance until such time as he has performed in full. In practice, the innocent party often accepts part-performance and starts using the performance. This sometimes leaves the breaching party in the unfair position that it may be impractical or impossible to make full performance, but any claim for counter- performance can be defended by the other party relying on the exceptio.

As a result, the courts have exercised a discretion to relax the principle of reciprocity and order the party making use of the defective or incomplete performance to pay a reduced amount to the party in breach.

In BK Tooling, the Appellate Division confirmed this, and held that the courts have an equitable discretion to award a reduced contract price, depending on the nature of the defect, and the cost of repair, replacement, or substitute performance. The onus to prove the amount of reduction is on the party in breach claiming the reduced price. The plaintiff must allege and prove:

- that the other party is using his performance
- the cost of remedying defects
- that it would be equitable to award some remuneration despite breach
- that the circumstances are such that the court should exercise its discretion

Based on the ruling in BK Tooling, D is entitled to be compensated by E because:

1. E is utilising the defective performance
2. It would be equitable as D has completed most of the work
3. The counter-performance ought to be reduced by R20 000.00 (the amount it will cost to complete the job)

In the circumstances, D is entitled to receive R80 0000.00 from E, which represents the difference between the contract price and the cost to complete the job.

QUESTION 4

Joanne goes to XYZ car dealership to buy a new car and she concludes a contract with the dealership for the purchase of the car for R250 000. The manager at the dealership informs her that she is lucky as it is the last one available in the model that she chose. And the manager further informs her that they will only get delivery of this model next month, and that the new purchase price will be R290 000. On this basis, Joanne concluded the contract with the dealership on 1 February for the purchase price of R250 000, as she did not want to pay a higher price the following month for the same model car. With reference to the contract terms, Joanne was to pay for the car by 15 February, and on 9 February Joanne paid the full purchase price to XYZ car dealership. On 10 February when Joanne visits the car dealership, she is told by the manager that they received a higher offer for the same car from Mike, and that they sold the car to Mike. Joanne was informed that Mike had already paid for the car and had taken delivery of the car, and furthermore, the car was already registered in Mike's name. The manager apologised to Joanne and explained that the offer that they received from Mike was so good that they could not refuse it. It was later established that Mike was not aware that he took delivery of the car that Joanne purchased. XYZ car dealership subsequently offers to sell Joanne a car from the new fleet that will arrive in March for R290 000. **Joanne wants to institute a claim for damages against XYZ car dealership. Advise Joanne on the prospects of success for such a claim, and whether she can claim any amount from XYZ dealership.** Discuss fully. **Do not apply the Consumer Protection Act 68 of 2008. Your answer must not exceed two typed pages or three written pages. [25]**

In terms of the difference rule the extent of the plaintiff's patrimonial or financial loss is determined by comparing the patrimonial position he or she presently occupies after the breach with the hypothetical patrimonial position he or she would have occupied had the contract been properly performed.

The courts often use a more concrete approach in determining the quantum by focusing on the actual element of the patrimony that is affected. According to this approach, damage is calculated by comparing the value that the asset or obligation would have had if the contract had been properly performed, with its actual value after the breach.

Thus, the approach focuses on the specific asset or right and not on the patrimony as a whole.

In practice, the quantification will depend on the nature of the loss that has occurred. For example, the amount of damages may be determined with reference to:

● the market value of the defective goods received as compared with the market value of the goods without the defect;

● the cost of repairing a defective performance or object to make it conform with the requirements of the contract;

● the amount of profit that a retailer could have made, but lost due to the breach;

● the cost of completing an incomplete performance;

● the additional price that must be paid for replacement goods, where defective goods are rejected or where the contract is cancelled; and

● interest paid on an overdraft by the innocent party, where late payment is made.

The financial loss or damage suffered by the plaintiff must have been caused by the breach (causation). The relevant principles to the enquiry into causation were authoritatively set out in International Shipping Co (Pty) Ltd v Bentley. The enquiry entails a two-stage process:

1. firstly, one asks whether as a matter of fact the breach causally contributed to the loss in question; and

2. secondly, if the first question yields a positive answer, one asks whether, as amatter of law, the causal connection between the breach and the loss is sufficiently close that the party in breach should be held responsible for it.

The reason for the distinction between factual and legal causation is that a breach of contract, like a

delict, can give rise to a multitude of consequences, some of which might be quite unexpected. As a matter of fairness, the defendant cannot be held liable for all these consequences, no matter how remote they are from the breach. The requirement of legal causation serves the purpose of cutting the causal chain at an appropriate point, and thereby limiting the liability of the defendant.

Factual causation. This is established by means of the 'but-for' test (or conditio sine qua non test). The test enquires whether the loss in question would have been suffered had the breach of contract not been committed. If, but for the breach, the loss would not have been suffered, the breach is a factual cause of the loss; conversely, if the loss would in any event have been suffered, the breach is not a factual cause of the loss. The innocent party needs to prove, on a balance of probabilities, that the loss would not have been suffered, but for the breach. If it fails to establish this causal link, that is the end of the enquiry and the damages claim must fail.

Legal causation. The aim is to protect the party in breach from liability that is too wide ranging and unreasonable. The test for legal causation turns on the issue of remoteness

– that is, whether the causal connection that exists between the breach and the loss is sufficiently close to justify the imposition of liability.

The approach to remoteness has traditionally been based on a distinction between general and special damages. In terms of the traditional approach, general damages flowing from the breach of contract are not too remote and hence are recoverable as a matter of course; special damages, on the other hand, are presumed to be too remote unless exceptional circumstances are present. General damages, then, are those that flow naturally and generally from the kind of breach in question. They are the sort of damages that might be expected in the ordinary course of things to result from the breach. As such, they would have been foreseeable to a reasonable person entering into the contract as a probable consequence of the breach in question.

Application to the facts

In the given scenario Joanne would have paid R250 000.00 for the car ,but for the breach of contract by XYZ car dealership. Joanne will succeed in claiming these amounts if she proves that they are general damages flowing directly from the natural breach of the contract and that they are not too remote. Due to the breach she will ow have to pay R290 00.00, which is R40 000.00 more than she would have paid if the breach has not been committed

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QUESTION 1

State the requirements for a valid offer and a valid acceptance. Do not **discuss** these requirements. **And in your answer do not make any reference to the Consumer Protection Act 68 of 2008.**

[10]

1.1 The offer must be firm

The offer must be a firm one, made animo contrahendi – that is to say, with the intention that its acceptance will call into being a binding contract. This requirement is not fulfilled if one of the parties makes a tentative statement to the other with the intention of sounding the other out in order to find out whether he or she would be prepared to enter into negotiations (Efroiken v Simon 1921 CPD 367). Whether a particular declaration amounts to a firm offer, or is merely a tentative indication of willingness to do business, may not always be easy to determine. It is ultimately a question of fact to be decided in the light of all the relevant circumstances (Pitout v North Cape Livestock Co-operative Ltd 1977 (4) SA 842 (A).

1.2 The offer must be complete (1)

The offer must contain all the material terms of the proposed agreement – there cannot be further matters that still have to be negotiated before the overall agreement can take effect (OK Bazaars v Bloch 1929 WLD 37; Lambons (Edms) Bpk v BMW (Suid Afrika) (Edms) Bpk 1997 (4) SA 141 (SCA)). Often, when large contracts are negotiated, various issues have to be settled before the deal can go ahead. In such a case, it is said that 'nothing is agreed until everything is agreed'. In other words, the fact that the parties have reached agreement on issues A, B and C cannot give rise to binding obligations, if issues D and E still have to be discussed, and the intention of the parties is that there will be no binding contract until a comprehensive agreement is reached. However, if the intention of the parties is that the preliminary agreement in respect of issues A, B and C should be binding on them, irrespective of whether they ever reach consensus on outstanding issues D and E, then of course the preliminary agreement will indeed constitute a binding contract. If agreement is subsequently reached on issues D and E, the preliminary agreement will be incorporated into and superseded by the more comprehensive agreement (CGEE Alsthom Equipments et Enterprises Electriques, South African Division v GKN Sankey (Pty) Ltd 1987 (1) SA 81 (A);Belmore v Minister of Finance 1948 (2) SA 852 (SR)).

1.3 The offer must be clear and certain

The offer must be sufficiently certain; it should be enough for the addressee merely to answer 'Yes', for a contract to come into being. If the offer is so vague that it fails to provide a reasonably clear indication of what the offeror has in mind, no acceptance of the offer can create a binding obligation, because it will be impossible to determine the content of that obligation.

QUESTION 2

Y meets Z on 1 July and hands Z a signed written offer (including all the material terms), for the purchase of Z's Rolex watch. Y's offer is for R50 000 and one of the terms of the offer states: "This offer lapses on 30 August". Z accepts the offer and signs this document on 15 August. Z posts the document to Y on 28 August. The letter reaches Y on 1 September and on this date Y opens the letter and notices that Z has signed the document. Did Y and Z conclude a valid contract of sale? Discuss fully. **Do not apply the Consumer Protection Act 68 of 2008. [10]**

The question relates to the legal rules pertaining to when and where an acceptance takes effect. More specifically, it has to be considered whether Z's acceptance was legally effective, based on the facts presented

The general rule is that a contract only comes into being when the offeror knows that his/her offer has been accepted The theory which explains this rule is the information theory. This general rule gives effect to one of the requirements of subjective consensus which is the primary basis of contractual liability. If we apply the general rule, it is clear that the offer expired before acceptance, but first it has to be decided whether the general rule (information theory) applies, or whether a recognised exception to the general rule will apply.

There are exceptions to the general rule . The offeror as dominus may dispense with the need of acceptance being communicated to him /her or can indicate in the offer that the contract will come into being at an earlier stage . This may be expressly indicated in the offer itself, but this is not the case in our problem. It may also be implied from all the circumstances, the language of offer itself and the nature of the contract. Not one of these implied instances are possibly applicable in our facts.

Where an offer is made through the post it is assumed (a legal fiction thus), if certain requirements are met that the offeror authorised acceptance by post as well as indicated that the contract is concluded as soon as the acceptance is posted (*Kergeulan Sealing and Whaling Co v Commissioner of Inland Revenue* 1939 AD 487). The expedition theory explains the postal rule. The postal rule is, however, not applicable to our problem as the offer was not made by post, which is one of the requirements to be met for the expedition theory to apply.

As a consequence, the general rule (in terms of the information theory) must out of necessity apply: Y had to be informed that her offer was accepted before the time of termination of her offer, and this did not transpire. Accordingly, by the time she read Z's letter on 01 September , her offer had already lapsed, and could not be validly accepted.

The giving of appropriate advice

No contract of sale came into being because Z failed to accept Y's offer timeously. Z may thus validly refuse to accept Y''s performance in terms of an invalid contract.

QUESTION 3

State the requirements that a party must prove in order to have a contract set aside, based on undue influence. Do not **discuss** these requirements. **[6]**

• That the other party exercised influence over him
• That this influence weakened his power of resistance and made his will pliable
• That the other party exercised this influence in an unscrupulous
manner in order to induce him to consent to a transaction which firstly was to his detriment and secondly, which he with normal free will would not have concluded

QUESTION 4

Carol, an owner of an exclusive bicycle shop advertised a special limited-edition bicycle for sale, and invited the public to make offers for the bicycle. Jane and Portia were among many other people who submitted written offers for the bicycle. Jane's offer was for R150 000, and Portia's offer was for R190 000. Although Carol intended to accept Portia's offer, she erroneously wrote a letter to Jane, wherein she accepted Jane's offer. Jane believes that an enforceable contract was formed but Carol denies this. Apply the direct reliance theory or the *iustus error* doctrine and advise if a legally binding contract was concluded between Carol and Jane. Discuss fully and refer to case law in your answer. Do not apply the Consumer ProtectionAct 68 of 2008. [20]

The facts seemingly indicate that Carol and Jane may not have reached actual consensus based on the will theory because Carol sent the acceptance letter to the wrong person. Carol sent the letter of acceptance to Jane by mistake as it intended to contract with another party. The question thus deals with error, and the application of the iustus error doctrine. The iustus error doctrine has two requirements: the mistake must be material (an application of the will theory) and reasonable (an indirect application of the reliance theory). Because Carol as the contract denier believes that a valid contract was not concluded, it must prove both of these requirements for the agreement to be declared null and void. If it fails to do so, then the contract will be valid and legally binding.

Carol sent the letter of acceptance Jane by mistake as it intended to contract with another party. The question is thus whether this mistake on the part of Carol is both material and reasonable in terms of the iustus error doctrine.
The mistake on the part of Carol relates to an error in persona. With this type of error, where a party intends to accept the offer of one party, but mistakenly accepts the offer of another party, such an error is usually material. This applied in ***Kok v Osborne*** where a party was mistaken as to the identity of the party or parties with whom he was contracting with, and the court held that his mistake was material. And in *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* a company incorrectly sent a letter of acceptance to the wrong offeror, as it intended to accept the offer from a different offeror, and such a mistake was considered to be material.

Therefore, the judgments in Potato Board and Osborne provides judicial support to reason that the mistake made by Carol was material.

Having established that there was a material mistake, the next leg of the enquiry based on the iustus error doctrine is to determine if the mistake Carol made was reasonable. There are usually three instances when a material mistake may be considered to be reasonable.

The first is where the mistake is caused by a misrepresentation on the part of the contract asserter ,The second is where the contract denier is not to blame for his or her mistake. And the third is where the contract denier did not cause a reasonable belief in the mind of the contract asserter that the contract denier was consenting to the agreement.

Firstly, Carol's mistake was not caused by a misrepresentation from Jane.
Secondly, Carol is to blame for the mistake as it addressed and sent the letter of acceptance to the wrong person.
Thirdly, Carol instilled a reasonable belief in the mind of Jane that she was consenting to the offer. Carol created this reasonable belief when it sent the letter of acceptance to Jane, who read it. Therefore, the mistake made by Carol was not reasonable.
The above reasoning is consistent with the finding of the court in Potato Board. In Potato Board, the respondent conducted a tender process for the building of a steel shed. After considering the tenders that were submitted, the respondent then sent a letter of acceptance to the appellant for the erection of the shed. Subsequently the appellant was informed by the respondent that this letter was sent based on an administrative error, and that it actually intended to accept another party's tender. The court held that a legally binding contract was concluded based on the concurring expression of the parties' intentions (the declaration theory). But importantly for purposes of the assignment question, the court further reasoned that if the respondent (as the contract denier) pleaded the iustus error defence to escape liability under the contract, this would have failed because the mistake was not reasonable.

Based on the application of the iustus error doctrine, Carol's mistake is material but it is not reasonable. This means that one of the requirements is not established for this defence to succeed in favour of Carol. Therefore, an enforceable contract was concluded between Jane and Carol.

QUESTION 5

Tony sells heroin drugs to Samuel for R50 000. Both Tony and Samuel are aware that it is illegal to buy or sell heroin. Tony delivers the heroin drugs to Samuel, but Samuel refuses to pay Tony. Section 5 of the Drugs and Drug Trafficking Act 140 of 1992 provides that no person shall buy or sell (a) any harmful dependence-producing substance or (b) any dangerous dependence-producing substance or (c) any undesirable dependence-producing substance, whilst section 4 prohibits the possession of such substances. Section 13 makes the contravention of both sections 4 and 5 a crime. The Act furthermore lists heroin as a harmful dependence-producing substance. Tony approaches a court to assist him, for the payment of R50 000 from Samuel or the return of the heroin drugs. Consider the merits of both claims and advise if he will be successful? **Discuss fully and refer to case law in your answer. Do not apply the Consumer Protection Act 68 of 2008.** **[20]**

In terms of the Act, dealing in drugs (heroin) is prohibited, therefore a contract of sale for drugs is illegal. Where a statute expressly states that such a contract is void, or is of no force or effect, then clearly this will be the case. In the facts of the question, there is no mention that the statute expressly renders a contract of this nature to be void. Therefore, it needs to be considered if the legislator impliedly intended that such a contract must be null and void. If it was impliedly intended to be a nullity, then the contract will be void. To determine if the legislator impliedly intended the contract to be void, the cumulative effect of a number of factors must be considered (see Hutchison and Pretorius Contract 188, for a discussion of these factors). When these factors are applied to the facts in the question, then it appears that the legislator impliedly intended that the illegal contract between Tony and Samuel, be rendered void. The motivation for this is that the legislator clearly prohibited the dealing and possession of undesirable dependence-producing substances like heroin to deter members of the public from being exposed to the intake and harmful effects of this drug. To validate such a contract will therefore bring about the harm that the statute is directed against, which is an indication that the legislator intended the contact between Tony and Samuel to be void. In terms of the Act, Tony's conduct constitutes a crime (dealing and being in possession of an undesirable dependence- producing substance). The Act does not merely serve to protect the revenue of the state, as the prohibition of dagga is intended to protect the health of all members of society from the harmful effects of this undesirable substance. As this entails protecting a public interest, is a further indicator that the legislator intended the contract between Tony and Samuel to be void. Nullifying the contract will definitely not cause greater inconvenience and injustice, therefore the contract should be deemed void.

Having established that the contract between Tony and Samuel was both illegal and void, the next it is appropriate to look at the consequences of a contract that is void for illegality. These consequences are that, based on the ex turpi rule, an illegal contract is void and that no contractual obligations arise out of it, which is relevant to this question. Where a contract is void in terms of an illegal contract, restitution of what was performed may possibly be claimed, based on an unjustified enrichment claim. However, where the parties are equally morally guilty, the par delictum rule can operate to prevent restitution from taking place. As Tony has already performed by delivering the heroin drugs to Samuel, he may want to claim restitution of this performance. Therefore, the par delictum rule is also relevant to this question. Accordingly, the application of both rules, the ex turpi rule and the par delictum rule are applicable to this question.

The situation might differ if Tony was an undercover cop. In such a case, Tony would not be equally morally guilty (Minister of Justice v Van Heerden) and so the par delictum rule would not apply.

In Jajbhay v Cassim, the Appellate Division held that the par delictum rule may be relaxed in appropriate circumstances in order to justice "between man and man" if it would be in the interests of public policy.

QUESTION 6

On 1 June M and Q conclude a contract whereby M undertakes to manufacture and install kitchen cupboards in Q's home for R100 000. At the time of entering into the contract, both parties were aware that the price of timber used for manufacturing kitchen cupboards was goingto go up by 20% from 1 August, which meant a saving of R20 000 for Q, because the contract was already concluded on 1 June. The parties agree that the contract price of R100 000 will be paid as soon as the kitchen cupboard units are installed. The parties further agree that the kitchen cupboards must be manufactured and installed by M on or before 15 July. The contract between the parties also stipulates that if either party is in breach of the contract, then the other party is entitled to cancel the contract. On 16 July Q tries to call M to find out why the kitchen cupboards have not been installed, but M's phone is off. On 10 August, M informs Q that he was on an international world tour holiday and only arrived back in the country recently, and thathe is willing to commence manufacturing the kitchen cupboards only if Q is willing to pay an extra R20 000 for the increase in the timber price. Q cancels the contract with M. Q subsequently contracts with X to manufacture and install the kitchen cupboards at a cost of R120 000. When X completes the job, Q approaches you for advice as he wants to claimR20 000 damages from M. Advise Q about the prospects of success for such a claim. **Discuss fully**. **Do not apply the Consumer Protection Act 68 of 2008.** **[20]**

This question deals with damages for breach of contract.

A plaintiff who wishes to claim damages for breach of contract must prove the following:

1. A breach of contract has been committed by the defendant
2. The plaintiff has suffered financial or patrimonial loss
3. There is a factual causal link between the breach and the loss
4. That the damages are general damages

M could possibly be in breach in the form of mora debitoris. Mora debitoris is the unjustifiable failure of a debtor to make timeous performance of a positive obligation that is due and enforceable, and still capable of performance in spite of such failure. Because performance has become impossible, it is not capable of performance

We could then say that M is in mora ex re. This is where the parties have expressly or impliedly stipulated a time for performance in their contract, a culpable failure by the debtor to perform on or before the due date automatically places him in more (ex re), without the need for any intervention by the credito (the day makes the demand on behalf of the man.) But for this result to follow, the stipulated time must be, not only certain to arrive, but also certain as to when it will arrive (for example, 1 January 2010).

The time for performance is fixed by implication when it is clear from the contract itself, or from admissible evidence of the surrounding circumstances, that the intention of the parties was that performance should be made on or before a certain date.

In the set of facts, a specific date was specified, being 15 July for performance.

The delay must be due to the fault of the debtor. It must be imputable to him, for example, because he himself was responsible for the delay or did not take the necessary precautions against the delay. The debtor will not be liable for breach if the delay was caused by force over which he had no control or by the acts of people for whose conduct he cannot be held responsible. Such circumstances provide the debtor with an excuse for his delay in performance. Where the delay is permanent and not due to the fault of the debtor, we are dealing with supervening impossibility of performance, which, from the debtor's point of view, serves both to release and to excuse him - it releases him in that it terminates the obligation and excuses him in that the debtor cannot be in mora. Where the delay is merely temporary and is not due to the fault of the debtor, it does not automatically release him, but merely excuses him - there is an excusatio a morae. Where the delay is in fact the debtor's fault, he is guilty of breach of contract, whether in the form of mora debitoris or prevention of performance.

In the above set of facts there is no indication that the performance was out of his control. M was actually on holiday . M has committed a breach of contract .

Q has also cancelled the lease as per the agreement .

It is evident that the plaintiff has suffered financial loss as Q mow had to pay the X R120 000.00 for the cupboards as apposed to the R100 000.00 she was to pay to M initially .

We can therefore say that there was a factual causal link between the breach and the loss and as a matter of legal causation

Q will therefore be able to claim damages from M successfully, because he will be able to prove that M committed a breach of contract. The aim of damages is to place the innocent party in their fulfilment position, that is, the position they would have been in had there been no breach. Q's claim for damages will more than likely be successful on the above set of facts .

QUESTION 7

A plaintiff is in breach of a reciprocal contract but nevertheless claims a reduced contract price. The defendant raises the *exceptio non adimpleti contractus* as a defence. What are the **requirements** that the plaintiff must allege and prove for the claim to be successful? Only **state** the requirements and **do not discuss** these requirements. **[8]**

Requirements for the exceptio non adimpleti contractus

1. Reciprocity of obligations.
2. Sequence of performances.
3. Incomplete performance.

The plaintiff must allege and prove:
• that the other party is using his performance
• the cost of remedying defects
• that it would be equitable to award some remuneration despite breach
• that the circumstances are such that the court should exercise its discretion
Based on the ruling in BK Tooling, Andy is entitled to be

QUESTION 8

Briefly discuss tacit terms. **[6]**

A tacit term is one that the parties did not specifically agree upon, but which (without anything being said) both or all of them expected to form part of their (oral or written) agreement. It is a wordless understanding having the same legal effect as an express term.
In ascertaining whether a contract contains a tacit term, the courts often employ the officious bystander test:
The court supposes that an impartial bystander had been present when the parties concluded their agreement and had asked the parties what would happen in a situation they did not foresee and for which their express agreement did not provide. If they were to agree that the answer to the stranger's question was self-evident, they are taken to have meant to incorporate the term into their contract and to have tacitly agreed on it.

MAY / JUNE 2022 EXAMINATION PAPER

State and **briefly discuss** any five (5) requirements for the formation of a valid contract. **[10]**

A contract entails promises or undertakings to perform on one or both sides, for instance a contract of donation requires that only one party to perform in accordance with the donation promised, whereas usually contracts are reciprocal in nature whereby one party promises to perform in exchange for the other party's promise of some other performance as well warranty would be the reference to the make and year of a car model that is the subject matter of a possible sale. So as long as there is consensus between the parties, our law allows the party's the freedom to contract on anything, subject to the qualification that it must be possible and lawful

The constitutive formalities must be complied with, the minds of the parties involved must meet on all the material details of the agreement.

- All the parties must have the capacity to act, all the parties must have the mental capacity to understand the contract they are taking part in as well as the requirements and obligations that must be met. They must also be of legal age or have a legal guardian to represent them.
- There must be a consensus agreement between the parties. Both parties without force should agree upon entering the agreement as well as understand the obligations and requirements discussed between them.
- The performance stated at the time of entering the contract must be deemed possible. The obligations should be able to be met and it should not be an impossible task.
- The contract must be legal and enforceable by law. The contract cannot be prohibited by any common law or statutes

QUESTION 2

A robbery occurred over the weekend at ABC Furniture Stores in a small town. At the time of the robbery, X who was an innocent bystander watched the robbery and also noticed the motor vehicle that was used by the robbers. The next day, ABC Furniture Stores which is a well-known registered company, with many stores operating nationally, offers a reward of R50 000 in the local newspapers in the town, to anyone who provides information to the police which leads to the arrest of the robbers. X is not aware of the reward offered when he visits the police and informs them of all the information he remembered from watching the robbery. The police then use this material and valuable information to arrest the robbers. After the arrests are made by the police, X learns of the reward that was offered and he then claims the reward from ABC Furniture Stores but the company refuses to pay him. The robbers who were arrested are subsequently successfully prosecuted and convicted for the crime committed. Advise X fully about the prospects of success for instituting a legal claim against ABC Furniture Stores. **Refer to case law in your answer. Do not apply the Consumer Protection Act 68 of 2008. [20]**

An advertised reward is an offer to the public. The offer is accepted by performing the required act and the reward must be certain.

In *Bloom v American Swiss Watch Co* 1915 AD 100, the American Swiss Watch Co offered a

reward after a robbery at their shop for the giving of information to the police which lead to the arrest of the thieves and the recovery of the stolen goods. Bloom did so without knowing of the reward. He claimed the reward, but his claim was refused. On appeal, the court held that the reward was an offer open to the public. It could be accepted by providing information to the police. Bloom, however had no intention of accepting the offer because he did not know of its existence when he gave the information to the police.

The offer of reward of ABC Furniture Stores complies with the requirements for a valid offer:

1 The offer was firm. An offer must be made with the intention that its acceptance will result in a binding contract .

2 The offer was complete. An offer must include all material terms of the proposed agreement and there cannot be additional matters that still have to be discussed before the agreement can take effect . The offer contained all the material terms: provide information to the police leading to the arrest of the robbers in return for the reward of R50 000. The offer will be accepted by providing the required information.

3 The offer was clear and certain. An offer is sufficiently clear and certain if the mere answer of 'yes' by the addressee brings a valid contract into existence .If the offer is unclear and cannot capture what the offeror has in mind, no acceptance of the offer can create a binding contract. The offer by ABC Furniture was so clear that X as a member of the public could form a clear idea what ABC furniture had in mind: a reward of R50 000.00 was offered to any member public for the giving of information to the police leading to arrest of the robbers.

The giving of the required information will also constitute acceptance of the offer. Furthermore, an offer such as a promise of reward can be validly directed at undefined persons (the public).

Requirements of a valid acceptance :

1 The acceptance must be unqualified. The acceptance is complete and unequivocal, where the entire offer and nothing additional or less is accepted . X accepted the offer by providing the required information.
2 The acceptance must be by the person to whom the offer was made. Only the offeree can validly accept the offer (Bird v Sumerville 1961 (3) SA 194 (A). The general rule is that an offer should be addressed to a specific person, but an offer may also validly be directed to the public, such as an offer of a reward (Bloom v American Swiss Watch Co 1915 AD 100). The offer was directed at X as a member of the public and could be validly accepted by him.
3 The acceptance must be a conscious response to the offer. In Bloom v American Swiss Watch Co 1915 AD 100 the American Swiss Watch Co the court also held on appeal that that Bloom had no intention of accepting the offer because he did not know of its existence when he gave the information to the police.
4 The acceptance must be in the form prescribed by the offeror (if any). The offeror can prescribe any method of acceptance he or she sees fit (Carlill v Carbolic Smoke Ball Co (1893) 1 QB 256; Bloom v American Swiss Watch Co 1915 AD 100). In Laws v Rutherford 1924 AD 261, R gave L an option to accept an offer within 3 months by written notice. L failed to notify R of his acceptance in the prescribed manner. The court therefore found that no contract arose. By giving the police information leading to the arrest of the robbers, X's acceptance complied with the prescribed mode of acceptance of ABC furniture. The prescribed mode of acceptance was complied with when X provided the information to the police which led to relevant the arrests.

A valid contract did not arise between X and ABC furniture as we have seen in the Bloem case, X, had no intention of accepting the offer because he did not know of its existence when he gave the information to the police.

QUESTION 3

Set out the legal test for the **Direct** application of the reliance theory. Only set out the legal test. Do not discuss the legal test. **[6]**

The direct application of the reliance theory, the contractual liability is based on the reasonable reliance that the consensus has been obtained by the one contractor (contract denier) and creates in his mind the other consensus (Contract enforcer)

The questions will determine the test of direct application of the reliance theory:

• Was there a misrepresentation with the party's intention?

• Who made such a misrepresentation?

• Was the other party misled, and if so, would a responsible person also have been misled?

If the application of this test provide that the contract denier misled the contract enforcer to believe that the contract denier had intention coincided with his actual intention, the contract denier will be contractually liable.

QUESTION 4

What are the two (2) requirements to prove, for the *iustus error* doctrine to apply? Only set out the requirements. Do not discuss these requirements. **[4]**

- the mistake must be material (an application of the will theory)
- and reasonable (an indirect application of the reliance theory).

QUESTION 5

X sold a painting to Y for R50 000. Assume that in terms of the "Price Control Regulations Act of 2015", the maximum price that this type of painting can be sold for is R30 000. In terms of this Act, a contract of sale at a price in excess of the maximum amount prescribed for this type of painting, is void. Y was aware of the maximum regulation price prescribed for this type of sale, but X was not, when they were negotiating the sale price. X delivered the painting to Y, but Y refuses to pay the purchase price of R50 000. Will X succeed with a claim for the purchase price of R50 000, or with a claim for Y to return the painting to X? **Refer to case law in your answer. Do not apply the Consumer Protection Act 68 of 2008.** **[20]**

From the facts above it appears that the legality of the agreement is likely to be in dispute, as the sale price is in contravention of a statutory provision.

The price of R50 000 exceeds the maximum amount prescribed by the statute for this type of sale, and in accordance with the Act, the sale is deemed void. Accordingly, one is dealing with a statutory illegality rendering the sale to be void. Because this illegal contract is void, no contractual obligations arise from such a contract. This means that there is no contractual obligation for either party to perform in accordance with such a contract. Therefore, no contractual cause of action arises from an illegal contract that is deemed void. This is in accordance with the *ex turpi causa non oritur actio* (known as the *ex turpi* rule). A court does not have a discretion to relax this rule and there are no exceptions to this rule.

A claim for the return of the painting to X, would be a claim for restitution based on unjustified enrichment. So, whilst X cannot pursue a contractual claim in these circumstances, X can nevertheless try to reclaim the performance (painting) she already delivered to Y, with an unjustified enrichment claim. Essentially X will be seeking restitution of the performance she rendered, by claiming the return of the painting to her.

The relevant rule that a court will consider in these circumstances is the *in pari delicto potior est conditio possidentis* (known as the *par delictum* rule). In accordance with this rule, where two parties are equally morally guilty, the party who is in possession is in the stronger position, which prevents restitution from taking place. However, this is not an absolute rule and the court may relax the application of this rule in appropriate circumstances to do justice between the parties, otherwise to strictly apply this rule all the time can lead to a very harsh outcome against the party claiming the return of the performance he or she has already rendered. In this regard, the application of the *par delictum* rule can be relaxed where the party seeking restitution (in this case X who seeks the return of the painting), is less guilty than the other party (Y), or is not morally guilty at all, and where Y would be enriched at the expense of X if this rule is not relaxed.

From the facts presented, it is clear that X was not in equal guilt as Y, because X was not aware of the maximum price prescribed for the type of sale in question and Y was aware of the applicable prescribed amount. Y would also be enriched at the expense of X if the *par delictum* rule is not relaxed. It follows that X has a strong case to claim back the painting she delivered to Y, as a court is likely to relax the *par delictum* rule in these circumstances.

X may probably claim the return of the painting to him (X), because X was not aware of the maximum price regulation prescribed for this type of sale, and Y would be enriched at X's expense if the painting is not returned to X.

In *Klolow v Sullivan*, the purchaser reclaimed his performance in terms of an invalid sale.

QUESTION 6

X has been leasing a commercial property from Z for the past three years. The lease will come to an end on 30 September 2021. On 5 July 2021, X phones Z and offers to renew the lease for a further three years, which offer Z accepts whilst speaking to X. During this phone call, the material terms of the renewal agreement are agreed upon and X and Z further agree that the said material terms must be reduced to writing and signed by both parties, in order to have a written record of their agreement merely to facilitate proof of its terms. Subsequently on 5 August 2021, X is shocked to receive a letter from Z, advising X that there will be no renewal of the lease and that X should vacate the leased property on 30 September 2021. X and Z never reduced their oral agreement to writing. Advise X if a binding agreement with Z exists, for the renewal of the lease for a further three years. **Discuss fully. Refer to case law in your answer. Do not apply the Consumer Protection Act 68 of 2008. [20]**

This question deals essentially with formalities stipulated by the parties for a valid creation of a contract. The main question is whether a formality was stipulated in the oral agreement for the renewal of lease between the parties, that for such agreement to be valid it should be reduced to writing.

Parties to an oral agreement will often agree that their agreement should be reduced to writing, and perhaps also signed. In doing so, they may have the following intentions:

1. To have a written record of their agreement to facilitate proof of its terms. If so, the agreement is binding even if it is never reduced to writing.

2. Alternatively, they may intend that their oral agreement will not be binding upon them until it is reduced to writing and signed by them. In Goldblatt v Fremantle, the Appellate Division held that no contract existed because the parties intended their agreement to be concluded in writing, which also involved signing by the parties.

In the absence of contrary evidence, the law presumes that the intention of the parties was merely to facilitate proof of the terms of the agreement. The party who alleges otherwise bears the onus of proof.

In our case no binding agreement exists because the parties agreed that the oral agreement must be reduced to writing and signed, and this indicates their intention that the agreement will not be binding if this formality is not complied with.

QUESTION 7

Andy and Jabu conclude a contract wherein it is agreed that Andy will paint Jabu's office block by 31 August 2021, and Jabu agrees to pay Andy R100 000 upon completion of the work. When 80% of the work is completed Andy suddenly decides to go on vacation for a week and he is consequently unable to complete the job by 31 August 2021. Jabu does not cancel the contract, but he (Jabu) refuses to pay Andy any money for his (Andy's) services rendered. It will cost Jabu R30 000 to complete the job. Advise Andy as to what amount (if any) he may recover from Jabu for the services that he rendered and on what basis. Discuss fully. Note that Jabu did NOT commit a breach of contract by refusing to pay Andy. **Refer to case law in your answer. Do not apply the Consumer Protection Act 68 of 2008.** **[20]**

This contract is reciprocal in nature. Andy has rendered defective performance and the issue is whether Jabu has to compensate Andy for the work that has already been done.

This question deals with the exceptio non adimpleti contractus. The exceptio is a defence that can be raised in the case of a reciprocal contract, where the performances due on either side are promised in exchange for one another. It is a remedy that permits a party to withhold their performance and ward off a claim for such performance until such time as the other party has either performed or tendered performance of their obligations.

Where a party who has to perform first has only performed part of its obligations or has rendered defective performance, that party is in principle not entitled to claim counter-performance until such time as he has performed in full. In practice, the innocent party often accepts part-performance and starts using the performance. This sometimes leaves the breaching party in the unfair position that it may be impractical or impossible to make full performance, but any claim for counter- performance can be defended by the other party relying on the exceptio.

As a result, the courts have exercised a discretion to relax the principle of reciprocity and order the party making use of the defective or incomplete performance to pay a reduced amount to the party in breach.

In BK Tooling, the Appellate Division confirmed this, and held that the courts have an equitable discretion to award a reduced contract price, depending on the nature of the defect, and the cost of repair, replacement, or substitute performance. The onus to prove the amount of reduction is on the party in breach claiming the reduced price. The plaintiff must allege and prove:

- that the other party is using his performance
- the cost of remedying defects
- that it would be equitable to award some remuneration despite breach
- that the circumstances are such that the court should exercise its discretion Based on the ruling in BK Tooling, Andy is entitled to be compensated

by Jabu because:

1. Jabu is utilising the defective performance
2. It would be equitable as Andy has completed most of the work
3. The counter-performance ought to be reduced by R3000 (the amount it will cost to complete the job)

In the circumstances, Andy is entitled to receive R7000 from Jabu, which represents the difference between the contract price and the cost to complete

the job.

UNIVERSITY EXAMINATIONS

May/June 2020

PVL3702

Law of Contract

100 Marks
2 Hours

QUESTION 1

A sues B based on a contract, which B denies exists. Which statement is **INCORRECT**?

1 Where *prima facie* proof exists that B agreed to the terms of an agreement, the evidentiary burden then shifts to B to show that despite this, consensus was not reached between the parties.

2 The contract can be proved through consensus.

3 The contract cannot be proved, based on reasonable reliance on the appearance of consensus.

4 In the pursuit to prove that the contract was concluded, a subjective state of mind can be proved with objective evidence. (2)

QUESTION 2

X resides in Durban. He (X) applies for a job to company Y, in Johannesburg. X is interviewed for the job and subsequently receives a letter from the company informing him that his application was successful and that he was being offered the job, and this letter stated the terms of the offer. In response thereto, X informed the company that he accepts the offer of employment, and then resigns from his employment in Durban. He also then sells his house in Durban, and makes arrangements to have his furniture moved to his new home in Johannesburg. He then receives an apology letter from company Y, stating that the letter of appointment was sent to him by mistake, and that it was intended to be sent to another person who was interviewed by the selection committee. The contested issue is whether an enforceable agreement was concluded between the parties. A court hearing this matter is likely to find that

1 an enforceable agreement was not concluded.

2 an enforceable agreement was concluded based on the application of the will theory.

3 the expedition theory applies to these set of facts.

4 **an enforceable agreement was concluded, based on the application of the doctrine of quasi-mutual assent.** (2)

QUESTION 3

Assume the same facts in question 2 above. A court hearing this matter is likely to find that company Y's mistake was

1 **material.**

2 non-material.

3 an *error in corpore*.

4 an error in *negotio*. (2)

QUESTION 4

Assume the same facts in question 2 above. A court hearing this matter is likely to find that company Y's mistake was

1 reasonable, because one party was led reasonably to believe by the other party that a valid contract was concluded between them.

2 reasonable, based on the concurring expressions of intention of the parties.

3 reasonable because it (Company Y) made an innocent mistake.

4 **not reasonable.** (2)

QUESTION 5

X rents premises from Y for R10 000 per month. In terms of the lease agreement, the rental must be paid in advance on the first day of each month. The lease also contains a clause requiring that any variation of any of the terms of the lease (including this clause) has to be in writing and signed by both parties, for it to be legally binding. Later Y and X agree orally that X may pay the rental on the third day of each month, but this oral agreement is never reduced to writing and signed by the parties. Y accepts payment for two months on the third day of the month. In the next month of June when X makes payment on the third day, Y changes his mind and informs X, that X should vacate the premises because X has breached the contract by not paying the rental on the first day of June. For each option below, two aspects of contract law are mentioned. In which option below are both aspects **MOST** relevant to consider, based on these set of facts?

1 Statutory formalities prescribed by law and *pacta sunt servanda*.

2 Formalities stipulated by the parties and waiver.

3 The *Shifren* principle and formalities prescribed by law.

4 Non-variation clauses and *stipulatio alteri*. (2)

QUESTION 6

Assume the same facts in question 5 above. If the Supreme Court of Appeal presently were to hear this dispute, it is likely to hold that

1 X did breach the contract of lease and Y did breach the subsequent oral agreement. Therefore, both parties are in equal guilt, entitling X as the possessor to remain on the premises.

2 Y did breach the oral agreement and therefore X is entitled to remain on the premises.

3 X did not breach the contract, because the oral agreement constitutes a binding compromise.

4 X did breach the contract, because the oral agreement is not legally binding. (2)

QUESTION 7

X makes an offer to sell her watch to Y for R2500. X and Y agree on 15 May that X's offer will be open for acceptance until 31 May. On 20 May, X informs Y that she (X) intends to sell the watch to Z on 30 May. On 21 May Y informs X that he (Y) accepts the offer, but X refuses to sell the watch to Y. Which statement is **CORRECT**?

1 From these set of facts, the only enforceable agreement concluded between X and Y occurred on 21 May.

2 After X informed Y on 20 May that she (X) intends to sell the watch to Z, the option contract concluded on 15 May became null and void, but it was subsequently revived on 21 May when Y accepted X's offer.

3 An option contract was concluded between X and Y on 15 May.

4 An option contract was concluded on 21 May when Y accepted the offer, and a further contract was concluded for the sale of the watch on this day. (2)

QUESTION 8

Assume the same facts in question 7 above. Y wants to compel X to sell the watch to him. How would you best advise Y?

1 To cancel the relevant contract and seek an order for specific performance against X.

2 To enforce the relevant contract and cancel the relevant contract simultaneously through the use of an interdict, to stop X from selling the watch to Z.

3 To cancel the relevant contract and seek to interdict X from selling the watch to Z.

4 **To enforce the relevant contract and seek to interdict X from selling the watch to Z.** (2)

QUESTION 9

X and Y are friends. They want to purchase Z's car. Z offers to sell his car to Y for R100 000. X and Y accept Z's offer. Which statement is **CORRECT**?

1 **Only Y could accept the offer for an enforceable agreement to be concluded.**

2 Either X or Y could accept the offer for an enforceable agreement to be concluded.

3 The acceptance by X and Y resulted in the conclusion of an enforceable agreement with Z.

4 A valid contract has been concluded, because Y is one of the parties who accepted the offer. (2)

QUESTION 10

Which statement is **CORRECT**?

1 If a performance is objectively impossible at the time of conclusion of the contract, the obligation agreed to remains enforceable.

2 **Where performance of either party becomes impossible after the conclusion of the contract, owing to the fault of either the debtor or the creditor, the contract is not terminated, but the party who rendered performance impossible has committed a breach of contract.**

3 The remedy of specific performance results in the termination of an obligation.

4 One of the requirements to prove supervening impossibility of performance is that the performance must be subjectively impossible. (2)

QUESTION 11

Which statement regarding cancellation of a contract is **INCORRECT**?

1 **Cancellation of a contract is a type of breach of contract.**

2 In the absence of a provision in the contract regulating the matter, a party can cancel a contract where the breach of contract on the part of the other party is material.

3 A party can cancel a contract where provision has been made in the contract for a right to resile in the circumstances that exist.

4 Cancellation of a contract is available to a party only in exceptional circumstances. (2)

QUESTION 12

Y has a watch that X likes. On 5 August, X sends a written offer by post to Y, to purchase Y's watch for R10000. One of the terms in the offer is that the offer will lapse on 20 August. The offer also stipulates that X must be aware of the acceptance, for any contractual obligations to arise. Y writes the letter of acceptance on 9 August in response to X's offer, and Y posts this written acceptance on 10 August. X's son collects the post from the Post Office on 17 August, and amongst the sealed letters of post collected, is Y's acceptance. X's son is not responsible and only hands all the sealed post to X, on 20 August. On 21 August, X opens the post and reads the acceptance. Which theory forms the primary basis to apply under South African law, when considering if a contract was concluded between the parties?

1 **An objective application of the declaration theory.**

2 A subjective application of the reliance theory.

3 A subjective application of the will theory.

4 An objective application of the will theory. (2)

QUESTION 13

Assume the same facts in question 12 above. Which statement is **CORRECT**?

1 **A valid contract was concluded between X and Y on 10 August, based on the application of the expedition theory.**

2 The correct theory to apply is the information theory, therefore a valid contract was not concluded between X and Y.

3 The correct theory to apply is the reception theory, therefore a contract was concluded between X and Y on 20 August.

4 The correct theory to apply is the declaration theory, therefore a valid contract was concluded on 9 August. (2)

QUESTION 14

Which statement is **INCORRECT**?

1 Public policy is informed by the concept of ubuntu.

2 According to the Supreme Court of Appeal, concepts such as fairness, good faith and reasonableness, are not independent substantive rules in contract law, which a judge can apply to enforce contractual justice between the parties.

3 The Constitutional Court has held that self-autonomy or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity.

4 **The *exceptio doli generalis* is a substantive defence based on equity which was received and judicially recognised in Roman-Dutch law, and which is presently also recognised in South African law.** (2)

QUESTION 15

P buys S's painting for R50 000 on 1 June and pays S R50 000 immediately. The parties agree that S will deliver the painting to P at her (P's) house on 5 June. S attempts to deliver the painting to P on 5 June, but P refuses to accept delivery as she is busy entertaining her guests. She instead tells S to deliver the painting the next day. Which statement is **CORRECT**?

1 P has not committed breach of contract, as S must first give P notice to accept S's performance within a reasonable time, in order to place P in *mora*.

2 P committed a breach of the contract, by not timeously accepting S's performance.

3 P by her conduct has repudiated the contract.

4 **Because P prevented S from performing, P committed prevention of performance.** (2)

QUESTION 16

X has a watch that Y likes. X offers to sell her watch to Y for R10 000. Y accepts this offer, and X and Y further agree that they will reduce their oral contract to writing and that they will both sign it ("the writing clause"). The parties failed to reduce their contract to writing and sign it. The purpose for the parties' stipulation to reduce their contract to writing and have it signed was to have a written record of their agreement merely to facilitate proof of the terms of the agreement. X insists that a binding contract was not concluded between the parties because the writing clause was never executed by both parties. Y believes that a binding contract was concluded. From this set of facts, the **MOST** important legal dispute which is likely to arise between X and Y, relates to

1 non-variation clauses.

2 the application of statutory formalities.

3 whether a formality has been prescribed by the parties.

4 the declaration theory. (2)

QUESTION 17

Assume the same facts in question 16 above. Which statement is **CORRECT?**

1 Since there is no contrary evidence to suggest otherwise, the law presumes that the oral agreement will not be binding until it is reduced to writing and signed by the parties.

2 The onus is on Y to prove that the parties (X and Y) intended the writing clause to operate as a requirement for the validity of the contract.

3 Because the intended purpose for the writing clause was to facilitate proof of the terms of the agreement, without compliance with this clause, the terms of the agreement cannot be proved, therefore a binding agreement was not concluded between X and Y.

4 **A binding contract of sale was concluded between X and Y.** (2)

QUESTION 18

X and Y conclude a contract. Indicate when their contract will be **VOIDABLE:**

1 The contract is subject to a resolutive condition which has been fulfilled.

2 X and Y's performances become objectively impossible without the fault of either party, after the contract has been concluded.

3 The contract is subject to a suspensive condition which has not yet been fulfilled.

4 **Y concluded the contract under circumstances where the requirements for a negligent misrepresentation on the part of X can be proved.** (2)

QUESTION 19

X and Y conclude a contract, in terms of which X rents a house from Y in Durban for R9 000 a month, until she finds work in Cape Town. The contract is subject to a

1 suspensive condition.

2 resolutive condition.

3 suspensive time clause.

4 resolutive time clause. (2)

QUESTION 20

D, a builder, and E agree that D will build a house on E's land for R600 000, which must be completely built on 30 April. It was also agreed that the amount of R600 000 is payable to D on 30 April, only if the house is completely built on this date. On 30 April the house is only 90% complete. On 1 May, E and his family move into the house. It would cost R50 000 for E to complete the house. E refuses to pay any amount to D because D failed to complete building the house timeously. Taking into account that E and his family moved into the house on 1 May, which statement is **CORRECT**?

1 **E did not commit a breach of the contract.**

2 E committed breach of the contract in the form of *mora creditoris*.

3 E committed breach of contract in the form of repudiation.

4 E committed breach of contract in the form of prevention of performance. (2)

QUESTION 21

Assume the same facts in question 20 above. The contract between the parties is a

1 **unilateral and bilateral reciprocal contract.**

2 unilateral contract that is a reciprocal contract.

3 bilateral contract that is a reciprocal contract.

4 bilateral contract that is not a reciprocal contract. (2)

QUESTION 22

Assume the same facts in question 20 above. Which answer reflects the **CORRECT** legal position?

1 D is not entitled to any payment from E.

2 **D is entitled to a reduced amount, quantified as R550 000, provided that E is utilising the defective performance, and all the other requirements for such a claim can be proved.**

3 D is entitled to a reduced amount, quantified as R540 000 (which is 90% of R600 000), provided that it is equitable, and all the other requirements for such a claim can be proved.

4 D is entitled to a reduced amount, quantified as the difference between the market value the house would have had in its completed state and the current market value of the house in its uncompleted state. (2)

Assume the same facts in question 20 above. If the court exercises its' discretion to grant a monetary award to D, such a claim is likely to be

1 **contractual.**

2 delictual.

3 based on unjustified enrichment.

4 based on cession. (2)

QUESTION 24

Assume the same facts in question 20 above. The failure by D to complete building the house in accordance with the terms agreed to by the parties, raises the issue whether D breached the contract. In this regard, which two forms of breach are **MOST** relevant to consider?

1 positive malperformance and an anticipatory breach of contract.

2 ***mora debitoris*** **and positive malperformance.**

3 repudiation and *mora debitoris*.

4 prevention of performance and *mora creditoris*. (2)

QUESTION 25

Which statement is **INCORRECT**?

1 Where the requirements for commercial bribery are proved by party Z, it (party Z) has the right to set aside the contract induced by the bribery of its (party Z's) agent.

2 **One of the requirements to prove for commercial bribery to exist, is a reward.**

3 In South Africa, the basis for recognising commercial bribery as a cause of action that the principal can pursue to have the relevant contract set aside, is because it stems from fraudulent conduct on the part of the briber and the agent.

4 Where the requirements for commercial bribery are proved by the principal, the contract between the principal and the briber is not void. (2)

QUESTION 26

ABC company advertises that they have manufactured a patent medicine. The advert states that if this medication is taken, by any person, according to the manufacturer's prescription, that person will not become ill with the coronavirus sickness. And the advert states that the company is so confident of this medication, that if anyone does get sick with this virus, after taking the medication as prescribed, the company will pay that person R50 000. On the basis of the advert, Y purchased the medication, and he took the medication as it was prescribed by the manufacturer (ABC company). Unfortunately for Y, he still fell ill with the coronavirus. Upset about this, Y claims R50 000 from ABC company. Which statement is **CORRECT?**

1 The ABC company advertisement is merely an invitation to do business, rather than an offer.

2 ABC company made a valid offer which was firm, complete, clear and certain.

3 The offer made by ABC company is not valid because it was not directed at a specified person.

4 The offer from ABC company was firm, clear and certain, but it was not complete. (2)

QUESTION 27

Assume the same facts in question 26 above. Assume further that a valid offer was made by ABC company. Which statement is **CORRECT**?

1 Y's acceptance was not a conscious response to the offer.

2 Y did not inform ABC company that he (Y) had accepted the offer, therefore an enforceable contract was not concluded between the parties.

3 Y did not comply with the mode of acceptance prescribed by ABC company.

4 **A valid and binding contract was concluded between ABC company and Y.** (2)

QUESTION 28

Which statement is **INCORRECT**?

1 Sometimes, concurrent contractual and delictual liability can arise, such that the plaintiff may sue the defendant, on either basis.

2 In general, a delictual obligation is imposed by law whereas a contractual obligation is voluntarily assumed by the parties.

3 The law of contract, delict, and unjustified enrichment, do not all relate to the law of obligations.

4 In the absence of a valid contract, an unjustified enrichment claim may arise when there is a transfer of wealth from one person's estate to another person's estate, without a good legal ground or cause for this shift. (2)

QUESTION 29

X sold a painting to Y for R50 000. Assume that in terms of the "Price Control Regulations Act of 2015", the maximum price that this type of painting can be sold for is R30 000. In terms of this Act, a contract of sale at a price in excess of the maximum amount prescribed for this type of painting, is void. Y was aware about the maximum regulation price prescribed for this type of sale, but X was not, when they were negotiating the sale price. X delivered the painting to Y, but Y refuses to pay the purchase price of R50 000. The material focus of this dispute rests on which requirement, relating to the validity of the agreement between X and Y?

1 **Legality.**

2 Possibility.

3 Consensus.

4 Formalities. (2)

QUESTION 30

Assume the same facts in question 29 above. Which statement is **CORRECT**?

1 Contractually, X can claim the painting back as Y has committed a breach of contract.

2 Contractually, X can claim the painting back as Y has been enriched at X's expense.

3 **X may claim the return of the painting to him (X), because X was not aware of the maximum price regulation prescribed for this type of sale, and Y would be enriched at X's expense if the painting is not returned to X.**

4 Because both parties were not in equal guilt, the court will order Y to pay X R30 000. (2)

QUESTION 31

Z walks into a hardware shop. He sees a handyman drill displayed with a price tag of R5 000. He takes the drill and proceeds to the cashier, who is the owner of the shop. The owner scans the drill, which reflects that R5 000 should be paid. Z pays R5 000 to the owner, and then walks out of the shop with the drill. For this transaction of R5 000, there is evidence of

1 an offer, a counter-offer, and an acceptance.

2 an oral offer, and acceptance by conduct.

3 **an invitation to do business, an offer, and an acceptance.**

4 an offer and acceptance by conduct, but there is no evidence of an invitation to do business. (2)

QUESTION 32

S fraudulently informs P that there are 2500 fruit trees on his (S's) farm, as a result of which P buys the farm for R800 000. P pays the R800 000, and the farm is thereafter registered in her (P's) name. It later turns out that there are only 2000 fruit trees on the farm. Despite this, P decides to uphold the contract, because he would have still concluded the contract with S, albeit on different terms, had he known that there were only 2000 fruit trees on the farm. P would have paid R700 000 had he known that the farm only had 2000 fruit trees. The value of the missing 500 trees is R200 000, if each tree were to be purchased individually. The market value of the farm is R700 000 with the 2000 fruit trees. The market value of the farm would have been R950 000, if it had 2500 fruit trees. What amount (if any) will P be able to claim from S, based on the most likely cause of action P will rely on, in pursuit of her claim?

1 **R100 000.**

2 R150 000.

3 R200 000.

4 R250 000 (2)

QUESTION 33

X and Y conclude a contract, in which X purchases Y's watch for R15 000. The next day Y receives a higher offer for the same watch from Z, which he (Y) accepts. Y immediately informs X that the watch has been sold to Z. The next day, prior to delivering the watch to Z, Y's conscience troubles him, and he destroys the watch. With reference to the contract concluded between Y and X, and regarding Y's conduct, which pair of options below are **MOST** relevant to consider?

1 Repudiation and positive malperformance.

2 Positive malperformance and prevention of performance.

3 Repudiation and *mora debitoris*.

4 **Prevention of performance and repudiation.** (2)

QUESTION 34

Assume the same facts in question 33 above. The market value of the watch is R25 000. X claims R10 000 damages from Y. Which statement is **CORRECT**?

1 In the contract between X and Y, because the parties did not agree to the damages X is now claiming, legal causation cannot be proved, therefore the claim will not succeed.

2 This claim is likely to succeed because the damages flowing from the breach are not too remote and therefore can be recovered as a matter of course.

3 The contract Y concluded with Z constitutes exceptional circumstances, therefore X's claim will not succeed.

4 X's claim will fail in accordance with the convention principle, but a court will uphold the claim based on the contemplation principle, because the damages were reasonably foreseeable. (2)

QUESTION 35

Jack is engaged to Jill. Jack has a very strong personality and eventually persuades Jill to sell and transfer her (Jill's) house that is worth R900 000 to him (Jack) at a purchase price of a mere R50 000. After registration of the property in Jack's name, he breaks off the engagement. Which option below has the **LEAST** amount of relevance, in relation to the cause of action that Jill is likely to rely on in her pursuit to have the transfer of the house into Jack's name set aside?

1 Proof that there was an erosion of Jill's ability to exercise a free and independent judgment at the time of contracting with Jack.

2 Proof that Jill was improperly induced to conclude the contract with Jack.

3 Proof that Jack and Jill were in a close relationship at the time of concluding their sale agreement.

4 **Proof that Jack applied improper pressure on Jill which amounted to intimidation.** (2)

QUESTION 36

Which statement relating to restraint of trade agreements is **INCORRECT?**

1 When assessing the reasonableness of a restraint of trade agreement, a factor to consider is the relative bargaining positions of the parties, which is further informed by the constitutional values of equality and dignity.

2 A restraint of trade agreement that is reasonable as between the parties may nevertheless affect an element of public interest that does not relate to the relationship between the parties, and protecting such an interest may justify a courts' decision to reject the operation of the restraint in question.

3 A restraint of trade agreement that is contrary to public policy is void and unenforceable.

4 The party seeking partial enforcement of an agreement in restraint of trade must raise the issue and establish a basis for partial enforcement, but the party who does not wish to be bound by the restraint, still bears the onus of proving that partial enforcement is contrary to the public interest. (2)

QUESTION 37

X finds himself stranded in a remote area when his motor vehicle breaks down. There is no cell phone reception in the area. After five days have passed without seeing anyone, Y comes along and offers to tow X to the nearest town for the exorbitant fee of R20 000. X initially turns the offer down, but his wife, Z, makes such a scene that he relents and accepts Y's offer. X refuses to pay Y R20 000 after being towed to the town. A reasonable fee for towing would have been R5 000, but Y claims the full R20 000 from X. Regarding this factual scenario, which statement (if any) is **CORRECT**?

1 Because of Y's unconscionable conduct, the contract is automatically unenforceable.

2 Under South African common law, in this scenario it is very clear that the contract concluded between X and Y is enforceable, and Y can only recover R15 000 from X, which amount represents the difference between the price agreed to (R20 000) and a reasonable fee (R5 000).

3 On the basis of a delictual claim, X will have to pay Y a reasonable fee of R5 000.

4 **None of the above statements.** (2)

QUESTION 38

Where a contract stipulates that each co-debtor is liable for the full amount of the debt, and the creditor can accordingly claim the full amount of the debt, or any lesser amount, from any one co-debtor or more than one co-debtor, this constitutes

1 simple joint liability.

2 *stipulatio alteri*.

3 liability *in solidum*.

4 collective joint liability. (2)

QUESTION 39

A contract of sale was concluded wherein X sold a Rolex watch to Y and Z. This is an example of

1 divisible performance.

2 indivisible performance.

3 divisible and indivisible performance.

4 neither divisible, nor indivisible performance. (2)

QUESTION 40

X and Y reach an agreement on the basis that should X sell her leather couch, she (X) will offer to sell it to Y first, before making an offer to sell the couch to any other person. X sells the couch to Z for R10 000 without first offering it to Y for sale. Z paid the R10 000 to X, and X delivered the couch to Z. Z was not aware of the contract concluded between X and Y. Which statement is **CORRECT**?

1 The agreement between X and Y, and the agreement between X and Z, are both legally binding agreements.

2 There is no agreement between X and Y about the price of the leather couch, therefore their agreement is void for vagueness.

3 Y has a real right against Z and a personal right against X.

4 The agreement between X and Z is legally binding, but the agreement between X and Y is not legally binding. (2)

QUESTION 41

Assume the same facts in question 40 above. Y is very upset that X sold the couch to Z, as she (Y) wants to claim the couch. Which remedy (if any) will attract a successful outcome for Y?

1 An application for an interdict against Z, to hand over the couch to X.

2 A claim for cancellation of the contract between X and Y, thereby forcing X and Z to make restitution of the couch in favour of Y.

3 A claim for specific performance against Y based on a unilateral declaration of intent.

4 **None of the above remedies.** (2)

QUESTION 42

X owes Y R7 000 for clothing goods that Y supplied to X. It turns out that Y owes X R5 000 for meat that X supplied to Y from her (X's) butchery. Both debts are due and enforceable. X therefore only pays Y R2 000. This is a case of

1 novation.

2 compromise.

3 set-off.

4 release. (2)

QUESTION 43

X claims R15 000 from Y. Y communicates to X that he (Y) does not owe any amount to X. Y nevertheless sends a cheque to X, which is payable to X for R10 000. Accompanying the cheque is a letter from Y informing X that the cheque payment is in full and final settlement of any claim that X has or may have against Y. Y further states in the letter that if X deposits the cheque, this will then bring finality to the matter and put an end to their dispute. X deposits the cheque into his (X's) bank account. X subsequently informs Y in writing that he received the R10 000 as part payment towards Y's debt of R15 000, and that the balance of R5 000 is therefore still due and payable. Y contends that X has no further claim against him (X). The disputed issue between X and Y is likely to centre around which aspect of contract law?

1 set-off.

2 compromise.

3 novation.

4 release. (2)

QUESTION 44

Assume the same facts in question 43 above. Based on the correct answer in question 43 above, assume furthermore that a court hearing the dispute finds that a valid offer was made by Y. Which option below is **NOT** controversial and is unlikely to be contested, regarding the acceptance aspect of the enquiry?

1 Whether there was an unequivocal acceptance on the part of X.

2 **Whether X rejected the offer**.

3 **Whether X's response in writing to Y, was a conscious response to the offer.**

4 Whether X qualified his acceptance and made a counter-offer. (2)

QUESTION 45

X buys land from Y for R500 000 after being told by Y that business rights exist on this land. It later emerges that no such rights exist. Y however believed in good faith that business rights did exist on the land. The contract contains a term which excludes Y's liability for "any misrepresentation" made prior, during and after the conclusion of the contract. X did not know of the existence of this clause because she did not read the contract of sale before signing it in Y's presence. The contract of sale complies with the formalities prescribed for contracts for the sale of land. Which two types of error below are the **MOST** relevant to consider, relating to X being told by Y that the land has business rights for these set of facts?

1 **An *error in substantia* and an *error in corpore*.**

2 An *error in corpore* and an *error in negotio*.

3 An *error in qualitate* and an *error in persona*.

4 An *error in substantia* and an *error in negotio*. (2)

QUESTION 46

Assume the same facts in question 45 above. X wants to have the contract set aside. Which statement is **CORRECT**?

1 Where the cause of action relied on by X is that of "innocent misrepresentation" because Y represented in good faith that the land had existing business rights, then if X proves the requirements for this cause of action, the contract will be rendered void.

2 Based on the entire factual scenario in question 45 above, X did not make a reasonable mistake.

3 **X made a misrepresentation regarding her intention to be bound to the contract of sale.**

4 X did not make any misrepresentation. (2)

QUESTION 47

X points a loaded gun at Y, and orders him (Y) to sign a written contractual document which X already signed. X explains that the document is for the sale of Y's car to him (X), at a price of R30 000. The market value of the car is R250 000. Y, fearing for his life, signs the document. If Y proves the requirements for the relevant cause of action that he (Y) is most likely to pursue, then the contract between X and Y becomes

1 void at the instance of Y.

2 neither void nor voidable, but it remains unenforceable.

3 void.

4 **voidable at the instance of Y.** (2)

QUESTION 48

X contracts with Y for the latter (Y) to repair his (X's) security gate at the entrance of his home. The parties agree that Y will do the repairs on 1 June. On 1 June X waits at home the whole day, but Y does not arrive. By not working on 1 June, X could not earn R7 500 of income. X lives in an area which has a high crime rate, so he suffered from mental stress and disappointment when Y did not arrive on 1 June to repair the security gate. X wants to pursue an appropriate remedy against Y. Which one of the following is necessary for X to prove as a requirement, for a contractual claim that the courts may recognise? Choose the most **CORRECT** answer?

1 The value of his (X's) loss of income in accordance with the market value approach.

2 That Y's breach of contract, was the dominant cause of X's loss of income.

3 The monetary quantification of his (X's) mental stress and disappointment.

4 **That on a balance of probabilities, he (X) would not have suffered the loss of income, if Y performed in accordance with the contract**. (2)

QUESTION 49

X contracts with Y for the latter (Y) to repair his (X's) television set. One week later, Y still did not arrive to repair X's television set. X then contracted with Z to repair the television set. Two days later, Z repairs the television set. A week later, Y arrives to repair X's television set. Which statement is **CORRECT**?

1 Regarding the contract concluded between X and Y, this is a case of supervening impossibility of performance.

2 Regarding the contract concluded between X and Y, both X and Y breached the contract.

3 Y breached the contract because of his delay in rendering performance.

4 X breached the contract that was concluded between X and Y. (2)

QUESTION 50

Which statement is **INCORRECT**?

1 If a material statement is made by the seller to the buyer during the negotiations, bearing on the quality of the *res vendita* and going beyond mere praise and commendation, and if the statement turns out to be unfounded, then the purchaser may cancel the contract or sue for a reduction in the purchase price.

2 For a damages claim to succeed based on a pre-contractual negligent misrepresentation as a cause of action, there must be a material breach of the contract that causes the loss.

3 Inducement is a requirement that must be proved, for a cause of action based on misrepresentation.

4 Generally, rescission and restitution are remedies available to a party who can prove the requirements for the misrepresentation in question. (2)

Total: [100]

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Question 1

A contract is an agreement

1 **creating obligations**
2 extinguishing a debt
3 whereby a right is transferred
4 that cannot entail the transfer of ownership of property
5 an example of which is release or discharge

Question 2

Which of the following is **NOT** a requirement?

1 the acceptance must be in the manner prescribed by the offeror(if any)
2 the person who accepts the offer must know of the existence of the offer before acceptance
3 the offer must be accepted by the person to whom the offer was made
4 the acceptance must be legal
5 **the formalities must be unqualified**

Question 3

What is the general effect of impossibility of performance

1 the contract is voidable
2 **the contract is void**
3 the creditor is guilty of misrepresentation
4 the debtor is guilty of contractual breach
5 the contractual obligation is terminated

Question 4

A right of pre-emption

1 is a right required by a contract
2 is a preferential right entitling the grantee to buy should the grantor decide to sell
3 is a preferential right entitling the grantee to compel the grantor to sell the thing in question at any time
4 **is both option 1 and 2**
5 is both option 1 and 3

Question 5

Y and Z reached an agreement that should Y sell his leather couch, he (Y) will offer to sell it to Z first before making an offer to sell the couch to any other person. Which statement is CORRECT?

1 Y and Z concluded an option contract
2 **Y and Z concluded a pre-emption contract**
3 Y and Z concluded neither an option contract nor a pre-emption contract
4 Y and Z concluded an option contract and a pre-emption contract
5 Y and Z concluded a contract subject to a resolutive condition

Question 6

Generally, an offer of reward is

1 An invitation to do business
2 An offer to the public
3 An offer directed at undefined persons
4 An offer directed to defined persons
5 Both option 2 and 3

Question 7

The notion that a contract is based on the one party leading the other party into a reasonable belief that consensus has been reached, has given rise to which theory?

1 the will theory
2 the declaration theory
3 the reliance theory
4 the reception theory
5 the expedition theory

Question 8

Which theory finds application under the Electric Communications and transactions act 25 of 2002?

1 the declaration theory
2 the expedition theory
3 the information theory
4 the reception theory
5 the reliance theory

Question 9

X sells his shop (business) in a shopping mall to Y. During the negotiations X informs Y of the overhead costs of running the shop but fails to mention that the rental for the shop space is soon to escalate dramatically. In fact, the rent will be so high that the shop will scarcely be able to turn a profit. What cause of action will Y be able to rely on in the circumstances in order to claim damages?

1 breach of contract
2 unjustified enrichment
3 the reliance theory
4 material mistake
5 culpable misrepresentation

Question 10

Cedric has joined a religious sect. Recently this sect took advantage of Cedric's good nature and convinced him to donate his motor vehicle to the sect, which Cedric did. Cedric approached you for legal advice, explaining that he wants his motor vehicle returned to him. The issue emanating from the facts relates to

1 duress
2 undue influence
3 commercial bribery
4 puffs
5 dicta et promissa

Question 11

Assume the same facts as in question 10. A court presiding over this case is likely to find that the religious sect

1 threatened Cedric and more particularly his property
2 instilled reasonable fear in Cedric
3 coerced Cedric to donate his motor vehicle to the sect
4 obtained an influence over Cedric, and that this influence weakened his powers of resistance and rendered his will compliant
5 conducted itself in such an unconscionable manner that it amounts to supervening impossibility of performance

Question 12

Y is a trusted employee of ABC company and is able to influence the managing director of ABC company. X bribes Y with R10 000 to influence the managing director to conclude a contract on behalf of ABC company with X to the benefit of X. The contract between the X and the ABC company is

1 voidable at the instance of ABC company
2 void
3 valid but unenforceable by X
4 valid, but ABC company may definitely claim contractual damages from X
5 valid, but ABC company may definitely claim delictual damages from X

Question 13

Assume the same facts as in question 12. The agreement between X and Y is

1 voidable at the instance of X
2 void
3 valid, but unenforceable
4 valid, but X may claim contractual damages from Y
5 valid, but Y may claim delictual damages from X

Question 14

The interpretation of contracts involves

1 **a textual approach**
2 a contextual approach
3 a step by step approach
4 a unitary approach
5 option 2 and 4

Question 15

The requirement that a contract must be legal for it to be valid means that

1 the minds of the parties must meet (or at least appear to meet) on all material aspects of their agreement
2 the parties must have the necessary capacity to contract
3 **the agreement must not be prohibited by statute or common law**
4 the obligations undertaken must be capable of performance when the agreement is entered into
5 the agreement must have a definite or determinable content, so that the obligations can be ascertained and enforced

Question 16

X and Y conclude a contract, in terms of which X rents a house from Y for a period of six months. The contract is subject to a

1 suspensive condition
2 resolutive condition
3 suspensive time clause
4 **resolutive time clause**
5 modus

Question 17

X promises to give Y R10 000 if Y successfully climbs the devils tooth in the Drakensburg. This is an obligation subject to a

1 suspensive time clause
2 resolutive time clause
3 **suspensive condition**
4 resolutive condition
5 modus

Question 18

Naturalia are

1 **terms automatically included in any contract belonging to one of the classes of specific contracts traditionally recognized by our law**

2 those distinctive terms used to identify or classify a contract as one of the specific contracts recognized by our common law

3 additional terms agreed upon by the parties that supplement the rights and duties incorporated by law into the particular contract in question

4 terms specifically agreed upon by the parties and are either articulated in an oral contract or written down

5 all terms that are not *incidentalia*

Question 19

A contract for the benefit of a third party relates to which legal concept?

1 Set-off

2 *Novatio*

3 Delegation

4 *Stipulatio alteri*

5 **Cession**

Question 20

O and C (an electrician) agrees that C will replace the electrical wiring in O's house for R10 000 and that the work will commence on 1 June. On 1 June, C arrives at O's house, But O refuses him entry into the house and tell him that he must return in two months time to do the job. O's conduct amounts to

1 *Mora debitoris*

2 ***Mora creditoris***

3 Positive malperformance

4 Negative malperformance

5 Supervening impossibility of performance

Question 21

Y sells his car to Z for R20 000 on 15 January. Y undertakes to deliver the car to Z on 17 January. Y destroys the car in a fit of anger on 16 January. The act of Y amounts to

1 impossibility of performance

2 **prevention of performance**

3 supervening impossibility of performance

4 *mora creditoris*

5 positive malperformance

Question 22

X undertakes to donate R100 000 to Y on 5 December 2020. This donation is subject to a

1 **suspensive condition**
2 resolutive condition
3 modal clause (modus)
4 suspensive time clause
5 the *ex turpi* rule and *stipulatio alteri*

Question 23

Which of the following is NOT a requirement for the creation of a valid contract

1 the minds of the parties must always actually meet
2 the performance must be possible at the time of conclusion of the contract
3 **the contract must be certain**
4 the contracting parties must have capacity to act
5 the prescribed formalities must be complied with

Question 24

X and Y conclude a contract under circumstances wherein C threatened to assault Y's husband. This threat may be used to prove an element of

1 misrepresentation
2 undue influence
3 **duress**
4 contractual illegality
5 material mistake

Question 25

What is the general effect of supervening impossibility of performance?

1 **termination of the contractual obligation**
2 the contract is rendered voidable at the insistence of the creditor
3 the contract is rendered voidable at the insistence of the debtor
4 the creditor is guilty of contractual breach
5 the debtor is guilty of contractual breach

Section B

Question 1

X has been leasing a commercial property from Z for the past three years. The lase will come to an end on 30 September 2019. On 5 July 2019, X phones Z and offers to renew the lease for a further three years, which offer Z accepts. During this phone call, the material terms of the renewal agreement are agreed upon and X and Z further agree that the said material terms must be reduced to writing and signed by both parties. Subsequently on 5 Augustus 2019, X is shocked to receive a letter from Z, advising X that there will be no renewal of the lease and that x should vacate the property on 30 September 2019. X and Z never reduced their oral agreement to writing. Advise X if a binding agreement with Z exists, for the renewal of the lease for a further three years. Discuss

This question deals essentially with formalities stipulated by the parties for a valid creation of a contract. The main question is whether a formality was stipulated in the oral agreement for the renewal of lease between the parties, that for such agreement to be valid it should be reduced to writing.

Parties to an oral agreement will often agree that their agreement should be reduced to writing, and perhaps also signed. In doing so, they may have the following intentions:

1. To have a written record of their agreement to facilitate proof of its

terms. If so, the agreement is binding even if it is never reduced to

writing.

2. Alternatively, they may intend that their oral agreement will not be binding upon them until it is reduced to writing and signed by them. In Goldblatt v Fremantle, the Appellate Division held that no contract existed because the parties intended their agreement to be concluded in writing, which also involved signing by the parties.

In the absence of contrary evidence, the law presumes that the intention of the parties was merely to facilitate proof of the terms of the agreement. The party who alleges otherwise bears the onus of proof.

In our case no binding agreement exists because the parties agreed that the oral agreement must be reduced to writing and signed, and this indicates their intention that the agreement will not be binding if this formality is not complied with.

Question 2

In the course of a conversation X offers to buy Y's motor car for R80 000. The next day Y writes to X accepting the offer. The letter does not reach X. Y claims delivery of the car and tenders payment of R80 000. Advise X if his offer has been accepted by Y. Discuss

A valid contract did not arise. Although X expressed their offer by way of a letter, X did not expressly or tacitly waive her right to be notified of possible acceptance. If Y had posted the letter, it would mean that the expedition theory would have applied and a contract would have been concluded once X had mailed the letter of acceptance, but, since X did not, the general rule, namely the information theory, will apply. A contract would therefore only have been concluded the moment that X had been notified of Y's acceptance. Since X had as yet not received and read his letter, Y was entitled to revoke his acceptance, with the result that there was no acceptance of X's offer, and thus no valid contract arose.

Question 3

X, an organizer of art exhibitions, contracted with Y for an exhibition to be held on 24 to 27 July. These dates were the only dates mentioned during the negotiations. After having been pressurized by X, Y hurriedly signed a standard form contract without reading it. The contract contained a clause permitting X to change the dates of the exhibition unilaterally. Thereafter X changed the dates. X had no reason to believe that Y would signed the contract if he had known of the term. Y averred that the contract was void. Will Y succeed in his attempt to have the contract set aside? Substantiate your answer and refer to relevant case law. Only use the subjective approach of the courts to answer this question. Do not apply the Consumer Protection Act to this question.

The essence of this problem is whether X and Y have reached consensus. Y will not be contractually bound if this requirement for a valid contract is absent.

At the outset, it must be considered whether agreement (consensus ad idem) as a contractual basis exists between the parties, as required in terms of the will theory. Consensus has three elements:

1. The parties must seriously intend to contract
2. The parties must be of one mind as to the material aspects of the proposed agreement (the terms and the identities of the parties to it)
3. The parties must be conscious of the fact that their minds have met.

In the present case, the parties were not in agreement as to the consequences they wished to create: Y thought that the dates for the exhibition (X's performance) was fixed, while X knew that the contract allowed X to unilaterally change the dates. This is a mistake as to the obligations the parties wished to create and is thus a material mistake, which excludes consensus between the parties. This means that no contract could arise on the basis of the will theory.

This type of mistake can be illustrated with a number of cases:

In George v Fairmead, the appellant signed a hotel register without reading it.

The register contained a clause excluding the respondent from liability for certain acts. The appellant was unaware of this term and his mistake related to a term that he believed would not be in the contract and as such was material because it related to an aspect of performance.

In Allen v Sixteen Stirling Investments, the plaintiff believed he was purchasing the erf pointed out to him by the seller's agent, while the written contract that he signed indicated the correct erf, which was a completely different property. His mistake related to performance and was material.

However, the matter does not end here. A party may be held contractually liable on the basis of a supplementary ground for liability, namely the reliance theory.

In this regard, the direct or indirect approach to the reliance theory may be

considered. INDIRECT APPROACH (IUSTUS ERROR DOCTRINE):

In terms of this approach, a party may escape liability to be bound to a contract if it can be established that the party labored under a mistake, which was both:

1. material and

2. reasonable.

It has already been shown that Y's mistake is material in the discussion above. It still has to be determined if Y's mistake was reasonable.

The contract denier's mistake will be reasonable in the following circumstances:

1. If caused by a misrepresentation on the part of the contract asserter (an unlawful misrepresentation)

2. If the contract denier is not to blame for the mistake

3. If the contract denier did not cause the contract asserter to have a reasonable belief that the contract denier assented to the contract.

If a legal duty to speak exists and a party has kept quiet when he ought to have spoken, that party has made an unlawful negative misrepresentation. A legal duty to speak will usually exist where:

• The asserter knows or ought to know as a reasonable person that the other party is mistaken

• Where, prior to the conclusion of the agreement the asserter created an impression directly conflicting with the provisions of the agreement, he must draw the contract denier's attention to this discrepancy (Du Toit v Atkinson's Motors).

Since X had no reason to believe that Y would have signed the contract had Y known of the term allowing X to change the dates of the exhibition unilaterally, X had a legal duty to point out this clause to
Y. X's failure to do so renders Y's material mistake

reasonable. DIRECT APPROACH:

With reference to the direct approach, contractual liability is based on the reasonable reliance that consensus has been reached, which the one contractant (the contract denier) creates in the mind of the other contractant (the contract asserter).

According to the Sonap case, the direct reliance approach involves a threefold enquiry:

1. Was there a misrepresentation regarding one party's intention?

2. Who made this misrepresentation?

3. Was the other party actually misled by this misrepresentation, and if so, would a reasonable person have been misled?

By signing the contract, Y, a party to the contract, misrepresented her intention to be bound by the clause allowing X to unilaterally change the dates. X knew that the only dates mentioned during negotiations were 24 to 27 July, that Y hastily signed the contract, and that the contract had a clause allowing X to unilaterally change the dates. X was probably not actually misled by the misrepresentation by Y, and nor would a reasonable person be misled in any event. There was therefore no reasonable reliance on consensus on the part of Y.

Y is not bound by the agreement because of lack of apparent and actual consensus.

Question 4

X, who is deeply troubled and in a highly emotional state, informs his minister (of religion) that he has bought a number of shares at a fraction of their true value and that, although there was nothing legally wrong with the transaction, he feels that he has acted in a way which was morally wrong. The minister advises X to donate the shares to the church to rid him of the feelings of guilt, and X there and then signs a contract in terms of which he donates all the shares to the church. A month later X seeks to have the contract SET ASIDE. Will he succeed? Discuss fully. Do not apply the ConsumerProtection Act of 2008 to this question. (15)

Identifying the problem (maximum of 3 marks)

Whether the minister has unduly influenced X in concluding this donation (if he has, then the contract is voidable).

Discussing the relevant law applicable to the problem, referring to the relevant case law, (maximum of 7 marks)

X's desire of having the contract set aside can relate to either having the contract declared void or having the contract rescinded because consensus may have been obtained in an improper manner.

Undue influence

The facts of this problem indicate that X asked his minister for advice and the minister influenced him to donate the shares to the church. This may be undue influence. South African courts have been influenced by English law in recognising undue influence. Undue influence has been expressly recognised as part of our law since a case in 1948 and this position has been confirmed by two later Appellate Division cases.

In English law, the existence of a special relationship between the parties gives rise to a rebuttable presumption of undue influence. It seems fairly clear that this is not the case in our law. The party who alleges undue

influence has the onus to prove that it occurred. The existence of a confidential relationship between the parties is a relevant factor in discharging that onus.

There are two forms of such a close relationship: a fiduciary relationship (eg as between a doctor and patient or attorney and client), or a relationship of respect and reverence (eg as in the case of parent and child, guardian and ward or religious leader and disciple). In such relationships the one party is entitled or obliged to advise and assist the other, and then misuses his or her superior position to influence and undermine the will of the latter. In our problem a relationship of respect existed between X and the minister.

Undue influence is a form of improper pressure brought to bear upon a person in order to induce him or her to enter into a contract. According to AD cases a party who seeks to set aside a contract on the ground of undue influence must establish:

1. that the other party obtained an influence over him or her;
2. that this influence weakened his or her powers of resistance and rendered his or her will compliant; and
3. that the other party used this influence in an unscrupulous manner to persuade him or her to agree to a transaction
    - that was prejudicial to him or her, and
    - which he or she would not have concluded with normal freedom of will.

It is not clear why prejudice should be proved since the basis of the action is vitiated consent. Mere inducement to contract should suffice.

Applying the law to the facts of the problem (maximum of 3 marks)

1 The minister clearly had influence over X

2 This influence definitely weakened X's power of resistance and made his will compliant.

3 The minister could have advised X to pay the seller of the shares the market value of the shares but instead saw the opportunity of enriching the church. The minister thus unscrupulously influenced X to donate the shares to the church.

4 This donation was clearly to the prejudice to of X: he stands to lose his shares. The fact that X wants to set the contract aside indicates that X would not have donated the shares with his normal freedom of will.

Where the undue influence is brought to bear by an outsider, the party influenced may set aside the contract only if the other contracting party was aware, at the time of the transaction, that the influence had been exercised. The minister either acted as agent of the church or he was an outsider.

On the one hand, it may seem that the minister was an outsider as there are no indications in the facts of this problem that the minister acted on behalf of the church. There is also no indication that the church knew of the undue influence.

On the other hand, the possibility exists that the minister acted as an authorised agent of the church. Here the legal effect is that the actions of the minister are in fact the actions of the church. This would mean that X was unduly influenced by thechurch.

The giving of appropriate advice (maximum of 2 mark)

If the minister is an outsider, X may not have the contract set aside. This is because there was either no undue influence on the part of the church, nor did the church know of the minister's undue influence.

OR:

If the minister was acting as an agent of the church, then X may have the contract set aside. This is because the contract would be voidable at his instance, due to the undue influence.

A maximum of 2 bonus marks should be awarded to students who identifies that there is a formality requirement to be complied with, for such a donation. But remember that a maximum a student can get in total for this question is 15 marks.

Formalities

The requirements for a valid contract are: consensus, capacity, formalities, legality, possibility and certainty. The facts of this problem indicate that the formalities may be implicated because X signs a written contract of donation. This is an executory donation, because there is no indication in the facts that the donation has been performed. In order to be valid such donation should be in writing and signed by X. The donation complies with the required formalities and is thus valid.

MAY/JUNE 2019

Question 1

A real agreement is an agreement

1 only creating obligations
2 whereby a right is transferred
3 only extinguishing a debt
4 an example of which is release or discharge
5 that cannot entail the transfer of ownership of property

Question 2

Which of the following is NOT a requirement for the creation of a valid contract

1 there must be agreement or apparent agreement between the parties
2 the contracting parties must have capacity to act
3 the performance must be possible after the contract is concluded
4 the contract must be legal
5 the prescribed formalities must be complied with

Question 3

Portia and Lucas are engaged and living together. They want to purchase Jeromes car. Jerome offers to sell his car to Lucas for R100 000. Lucas and Portia accept Jeromes offer. Which statement is CORRECT?

1 only Lucas could accept the offer
2 either Lucas or Portia could accept the offer as they are engaged
3 since the offer was only made to Lucas, the acceptance from both Portia and Lucas will never constitute a counter-offer
4 a valid contract has been concluded, because Lucas is one of the parties that accepted the offer
5 none of the above statements

Question 4

The notion that contracts are based on consensus, has given rise to which theory?

1 the declaration theory
2 the will theory
3 the reliance theory
4 the reception theory
5 the expedition theory

Question 5

A right of pre-emption

1 is a right acquired by a contract
2 is a right acquired by an offer
3 is a right acquired in terms of an option

4 is a preferential right entitling the grantee to compel the grantor to sell the thing in question at any time
5 encapsulates all of the above statements

Question 6

An innocent misrepresentation renders a contract

1 void
2 void without a claim for damages
3 voidable
4 unenforceable
5 neither void nor voidable, but it does give rise to a claim for damages

Question 7

X places an advertisement in the newspaper in which he offers to sell his car, a Porsche Carrera, for R800 000. X states that the Porsche is a 1995 model in the advertisement, while it is in fact a 1994 model which has been registered for the first time in 1995. X knows that this statement in the advertisement is untrue. Y reads the advertisement, phones X and concludes a contract of sale with X. The statement in the advertisement regarding the year model amounts to

1 fraud
2 mere puffing
3 **a *dictum et promissum***
4 a guarantee in the contract
5 both fraud and *dictum et promissum*

Question 8

Which statement(s) is/are CORRECT

1 **commercial bribery amounts to an abuse of circumstances**
2 commercial bribery amounts to misrepresentation
3 **commercial bribery can lead to a claim for the setting aside of the contract and restitution**
4 option 1 and 3
5 option 2 and 3

Question 9

John agrees with Michael, that Michael will paint John's holiday home at the coast for R30 000. Unbeknown to either of them the house had been destroyed in a storm the previous day. This is a case of

1 mutual mistake
2 supervening impossibility of performance
3 **impossibility of performance**
4 an obligation subject to a resolutive condition
5 an obligation subject to a suspensive condition

Question 10

Henry was arrested in a police trap for committing a crime when he sold drugs to a police man for R500 without authorization. Both the drugs and the R500 were delivered and ownership of both passed. The contract between Henry and the police man is

1 voidable because of misrepresentation on the part of Henry
2 void for vagueness
3 valid but unenforceable
4 voidable on the bases of illegality
5 void on the basis of illegality

Question 11

The state may claim the R500 from Henry in question (10) with

1 a contractual action
2 an enrichment action
3 a delictual action
4 the *rei vendicatio* (real action of the owner)
5 a statutory action

Question 12

X and Y conclude a contract. When will their contract be voidable?

1 X and Y have concluded a gambling contract which is prohibited by legislation
2 X's performance becomes absolutely impossible without his fault after the contract has been concluded.
3 The contract is subject to a suspensive to a suspensive condition which has not yet been fulfilled
4 Y concluded the contract under duress from X
5 The contract is subject to a resolutive condition which has been fulfilled

Question 13

X and Y conclude a contract, in terms of which X rents a house from Y for R2 000 a month until she finds work in cape town. The contract is subject to a

1 suspensive condition
2 resolutive condition
3 suspensive time clause
4 resolutive time clause
5 modus

Question 14

X inherits a watch which Y is interested in buying. Both X and Y believe the watch to be a genuine Rolex and know of each other belief. When they conclude the contract, Y tell X that he is only buying the watch because it is a Rolex. However, it turns out to be only an imitation. This is most probably a case of

1 resolutive condition
2 error in motive
3 suspensive condition
4 supposition
5 option 1 and 4

Question 15

Koos and Ronald are owners of champion horses. They regularly buy horse from each other for breeding purposes. On one occasion koos purchased a stallion from Ronald. It turned out that the stallion had a rare and deadly disease at the time of the purchase. Within two months of the purchase the stallion died from the illness. Koos wishes to cancel the contract and claim back the purchase price (R400 000) he paid, on the basis that Ronald breached a material term of the contract that ''the stallion will be free from any illness that is deadly". From the facts given the material term relied upon by koos, could be

1 a tacit term or a *naturalium* (singular of *naturalia*)
2 an express term or an *incidentalium* (singular of *incidentalia*)
3 a term implied by law or an *essentialium* (singular of *essentialia*)
4 a *naturalium* or an express term
5 none of the above

Question 16

Assume the same facts in question (15). Assume further that the material term relied upon by Koos does form part of the contract between Koos and Ronald as an express term. The breach of this term by Ronald is in the form of

1 positive malperformance
2 negative malperformance
3 repudiation
4 prevention of performance
5 supervening impossibility of performance

Question 17

X leases a video camera from Y to be delivered on 23 March. Y fails to deliver the camera on this day. Which for of breach of contract has taken place?

1 Mora creditoris and *mora ex re*
2 Mora debitoris and *mora ex persona*
3 Mora creditoris and *mora ex persona*
4 Mora debitoris* and *mora ex re
5 Prevention of performance

Question 18

X leases a video camera from Y. Y knows that X intends to film B's graduation ceremony on 23 March. Y undertakes to deliver the camera to X on 23 March and X undertakes to return the camera the next day. Y fails to deliver the camera on 23 March. Which for of breach of contract has taken place?

1. ***Mora creditoris* and *mora ex re***
2. *Mora debitoris* and *mora ex persona*
3. *Mora creditoris* and *mora ex persona*
4. ***Mora debitoris* and *mora ex re***
5. Prevention of performance

Question 19

Y lets premises to X from R10 000 per month. The rental has to be paid in advance on the first day of each month. The written contract of lease contains a clause requiring that any variation of any of the term of the leases (including this clause) has to be in writing and signed by both parties. Later Y and X agree orally that X may pay the rental on the third day of each month. Y accepts payment for two months on the third of the month. Y then changes his mind and informs X that X should vacate the premises because X has breached the contract by not paying the rental on the first of each month. Which answer reflect s the CORRECT legal position?

1 X does not breach the contract, because the oral agreement constitutes a binding novation
2 X breaches the contract, because the oral agreement is not legally binding
3 X does not breach the contract, because the oral agreement constitutes a binding compromise
4 Y breaches the oral agreement and therefore X in entitled to remain on the premises
5 X breaches the contract of lease an Y breaches the subsequent oral agreement. Therefore both parties are in equal guilt, entitling X as the possessor to remain on the premises

Question 20

Liability of which form(s) of misrepresentation may not be contractually excluded?

1 Innocent misrepresentation
2 Negligent misrepresentation
3 Grossly negligent misrepresentation
4 Fraudulent misrepresentation
5 Option 3 and 4

Question 21

Tony, a petrol attendant, sells heroin to Samuel for R1 000. Tony delivers the heroin to Samuel, but Samuel refuses to pay. Section 5 of the drugs and drug trafficking Act 140 of 1992 provides that no person shall deal in (a) any dependence-producing substance or (b) any dangerous dependence-producing substance or any undesirable dependence-producing substance, while section 4 prohibits the possession of such substances. Section 13 makes the contravention of both sections 4 and 5 a crime. Heroin is furthermore an undesirable dependence-producing substance. Tony approaches a court to assist him, either for the payment of R1 000 from Samuel or the return of the drugs. The

material focus of the dispute rests on which requirement relating to a validity of the agreement between Tony and Samuel?

1 consensus
2 formalities
3 possibility
4 legality
5 certainty

Question 22

Assume the same facts as in question (21). Most relevant to the dispute would be to consider the application of

1 the *ex turpi* rule and the *par delictum* rule
2 statutory illegality an restraint of trade agreements
3 public interest and rectification
4 the *par delictum* rule and capacity of the parties to contract
5 the *ex turpi* rule and *stipulatio alteri*

Question 23

Assume the same facts as in question (21). The court hearing this dispute is likely to find that

1 Tony can claim R1 000 contractual damages from Samuel
2 Tony will be granted an order for specific performance for the return of the heroin
3 Tony's request for the return of the heroin will fail because both parties were equally morally guilty
4 Tony's claim for a R1 000 from Samuel will succeed, but his claim for the return of the heroin will fail because the contract between both parties was only partially illegal
5 In order to achieve justice between man and man, Samuel should pay tony half the claim, which amounts to R500

Question 24

X and Y conclude a contract under circumstances wherein X threatened Y. This threat may be used to prove an element of

1 duress
2 undue influence
3 misrepresentation
4 contractual illegality
5 material mistake

QUESTION 25

X advertises her car for sale in the newspaper for the amount of R40 000. Y reads the advertisement, phones X and accepts her advertisement to sell her car. Which statement most probably reflects the CORRECT legal position?

1 X and Y concluded a contract because an offer and acceptance exists
2 X made an offer to the public at large
3 Y is the offeree
4 The advertisement is an invitation to do business
5 Option 1, 2 and 3

Section B

Question 1

Y signs and posts a written offer (including all material terms) to Z on 1 July, for the purchase of Z's apartment. Y's offer is for R800 000 and one of the terms of the offer states the "this offer lapses on 30 August". Z accepts the offer by signing the contract. Z posts the contract to y on 28 August. The letter reaches Y on 1 September. Y immediately opens the letter and notices that Z has signed the contract. Did Y and Z conclude a valid contract of sale? Discuss. You may accept that the contract complies with the required formalities.

The question is whether Z has accepted Y's offer in time and thus whether Z and Y have reached consensus.

When parties Y and Z contract in each other's presence (inter praesentes), Y's declaration of acceptance is communicated directly to Z, in her presence. Since there is no time lag between declaration and ascertainment of acceptance, there is no problem in determining when and where the contract is concluded.

However, when the parties contract at a distance (inter absentes), there will usually be a time lag between Z's declaration of acceptance and Y's learning that her offer has been accepted. The time lag inevitably raises the question of when Z's acceptance takes effect.

various theories in general contract literature.

1. The **declaration theory** states that the contract comes into being when and where the offeree expresses acceptance – that is, when he or she writes or signs the letter of acceptance.

2. The **expedition theory** states that the contract comes into being when and where the offeree posts his or her letter of acceptance.

3. The **reception theory** states that the agreement comes into being when the letter of acceptance reaches the address of the offeror.

4. The **information theory** states that the agreement is concluded when and where the offeror learns or is informed of the acceptance, in other words, when the offeror reads the letter of acceptance.

The general rule is that a contract comes into being only when the acceptance is communicated to the mind of the offeror. The information theory, which is the general rule in our law, states that the agreement is concluded when and where the offeror learns or is informed of the acceptance – in other words, when the offeror reads the letter of acceptance.

Exceptions to the general rule are that the information theory does not apply:

i. **where the offeror stipulates a different method of acceptance**; The information theory is subject to the qualification that the offeror as dominus may dispense with the need for acceptance to be communicated to him or her, orcan indicate an earlier time when acceptance will be effective to conclude the contract. Such a waiver of the requirement of notification of acceptance may be express, or it may be implied from all the circumstances, including the language of the offer and the nature of the contract.

ii. **in postal contracts**; our courts apply the expedition theory as the default rule for postal contracts, rather than the information theory. This is done on the basis of a legal fiction – namely, that by making an offer through the post, the offeror is deemed not only to have authorised acceptance by post, but also to have waived the requirement of notification of acceptance. In other words, unless he or she indicates otherwise, he or she is presumed to have intended that the contract would be concluded as

soon as the letter of acceptance is posted.

Cape Explosive Works Ltd v South African Oil and Fat Industries; Cape Explosive Works Ltd v Lever Brothers (South Africa) Ltd. The SA Oil and Fat Industries wrote a letter from Delmore in Gauteng to the plaintiff in Somerset West in the Cape, offering to sell glycerine to the plaintiff at a certain price. The plaintiff accepted the offer by letter. At a later stage, the plaintiff also accepted by letter another offer to sell glycerine, from Lever Bothers in Durban. Both letters of acceptance were posted at Somerset West. In actions on the contracts instituted by the plaintiff in the Cape Provincial Division, the defendants took exception to the court's jurisdiction on the ground that the contracts

were not entered into in the Cape, but in Gauteng and Natal respectively, since that was where the letters of acceptance were received and read by the respective defendants. The court held that a contract was concluded in each case when the letter of acceptance was posted at Somerset West. Therefore, the contracts were both concluded in the Cape and the Cape Provincial Division had jurisdiction.

The expedition theory applies only when all of the following circumstances are present:

- the offer is made by post or telegram;
- the postal services are operating normally;
- the offeror has not indicated a contrary intention, expressly or tacitly; and
- the contract is a commercial one

iii. in electronic contracts. Contracts entered into by means of email, SMS or other means of electronic communication are governed by the Electronic Communications and Transactions Act. In terms of this legislation, an agreement concluded between parties by means of data messages is concluded at the time when, and the place where, the acceptance of the offer is received by theofferor. Consequently, the reception theory rather

than the expedition theory applies in these circumstances. A data message is regarded as having been received by the offeror at his or her usual place of business or residence when the complete data message enters an information system designated or used for that purpose by the offeror and is capable of being retrieved and processed by him orher.

Application to the facts

The contract between Y and Z is effected by way of a post. This means that the expedition theory applies. By making an offer through the post, the offeror (Y) is deemed not only to have authorised acceptance by post, but also to have waived the

requirement of notification of acceptance. In other words, unless Y indicates otherwise, he is presumed to have intended that the contract would be concluded as soon as the letter of acceptance is posted. Therefore, the contract was concluded as soon as Z posted the letter back to Y on 28 August. A valid contract has been concluded between Y and Z.

Question 2

X, who is deeply troubled and in a highly emotional state, informs his minister(of religion) that he has bought a number of shares at a fraction of their true value and that, although there was nothing legally wrong with the transaction, he feels that he has acted in a way which was morally wrong. The minister advises X to donate the shares to the church to rid him of the feelings of guilt, and X there and then signs a contract in terms of which he donates all the shares to the church. A month later X seeks to have the donation SET ASIDE. Will he succeed? Discuss fully **Do not apply the consumer protection Act to this question**

Undue influence is a form of improper pressure brought to bear upon a person in

order to induce him or her to enter into a contract. The pressure is more subtle, involving an insidious erosion of the victim's ability to exercise a free and independent judgement in the matter, rather than threats or intimidation.

In most instances of undue influence, there is a close relationship between the parties – either a fiduciary relationship, as between a doctor and patient or attorney and client, or one of respect and reverence, as in the case of parent and child, guardian and ward or **religious leader and disciple** – which entitles or obliges the one party to advise and assist the other, and the former then misuses his or her superior position to influence and undermine the will of the latter.

in *Preller v Jordaan* a majority of the court held that the grounds for *restitutio in integrum* in Roman-Dutch law were wide enough to cover what is today referred to as undue influence. The case of *Patel v Grobbelaar* confirms that the doctrine of undue influence undoubtedly forms part of our modern law.

A party who seeks to set aside a contract on the ground of undue influence must establish:

1. that the other party obtained an influence over him or her;
2. that this influence weakened his or her powers of resistance and rendered his orher will compliant; and
3. that the other party used this influence in an unscrupulous manner to persuadehim or her to agree to a transaction that:
    - was prejudicial to him or her, and
    - which he or she would not have concluded with normal freedom of will.

Where the undue influence is brought to bear by an outsider, the party influenced may set aside the contract only if the other contracting party was aware, at the time of the transaction, that the influence had been exercised.

<u>Application to the facts</u>

X will have to prove the above facts against his minister of religion and he will be able to set his donation aside. From the given scenario undue influence appears to have been present hence the donation will be set aside.

Question 3

X, an organizer of art exhibitions, contracted with Y for an exhibition to be held on 24 to 27 July. These dates were the only dates mentioned during the negotiations. After having been pressurized by X, Y hurriedly signed a standard form contract without reading it. The contract contained a clause permitting X to change the dates of the exhibition unilaterally. Thereafter X changed the dates. X had no reason to believe that Y would signed the contract if he had known of the term. Y averred that the contract was void. Will Y succeed in his attempt to have the contract set aside? Substantiate your answer and refer to relevant case law. Only use the objective approach of the courts to answer this question. Do not apply the Consumer Protection Act to this question.

The essence of this problem is whether X and Y have reached consensus. Y will not be contractually bound if this requirement for a valid contract is absent. At the outset, it must be considered whether agreement (consensus ad idem) as a contractual basis exists between the parties, as required in terms of the will theory.

Consensus has three elements:

1. The parties must seriously intend to contract
2. The parties must be of one mind as to the material aspects of the proposed agreement (the terms and the identities of the parties to it)
3. The parties must be conscious of the fact that their minds have met.

In the present case, the parties were not in agreement as to the consequences they wished to create: Y thought that the dates for the exhibition (X's performance) were fixed, while X knew that the contract allowed him (X) to unilaterally change the dates. This is a mistake as to the obligations the parties

wished to create and is thus a material mistake, which excludes consensus between the parties. This means that no contract could arise on the basis of the will theory. This type of mistake can be illustrated with a number of cases:

- In *George v Fairmead*, the appellant signed a hotel register without reading it. The register contained a clause excluding the respondent from liability for certain acts. The appellant was unaware of this term and his mistake related to a term that he believed would not be in the contract and as such was material because it relatedto an aspect of performance.

- In *Allen v Sixteen Stirling Investments*, the plaintiff believed he was purchasing the erf pointed out to him by the seller's agent, while the written contract that hesigned indicated the correct erf, which was a completely different property. His mistake related to performance and was material.

However, the matter does not end here. A party may be held contractually liable on the basis of a supplementary ground for liability, namely the reliance theory. In this regard, the direct or indirect approach to the reliance theory may be considered.

<u>Indirect approach (iustus error doctrine):</u>

In terms of this approach, a party may escape liability to be bound to a contract if it can be established that the party laboured under a mistake, which was both:

i. material and

ii. reasonable.

It has already been shown that Y's mistake is material in the discussion above. It still has to be determined if Y's mistake was reasonable. The contract denier's mistake will be reasonable in the following circumstances:

1. If caused by a misrepresentation on the part of the contract asserter (an

unlawful misrepresentation)

2. If the contract denier is not to blame for the mistake

3. If the contract denier did not cause the contract asserter to have a reasonable belief that the contract denier assented to the contract.

If a legal duty to speak exists and a party has kept quiet when he ought to have spoken, that party has made an unlawful negative misrepresentation. A legal duty to speak will usually exist where:

- The asserter knows or ought to know as a reasonable person that the other party is mistaken

- Where, prior to the conclusion of the agreement the asserter created an impression directly conflicting with the provisions of the agreement, he mustdraw the contract denier's attention to this discrepancy (Du Toit v Atkinson's Motors).

Since X had no reason to believe that Y would have signed the contract had Y known of the term allowing X to change the dates of the exhibition unilaterally, X had a legal duty to point out this clause to Y. X's failure to do so renders Y's material mistake reasonable.

<u>Direct approach:</u>

With reference to the direct approach, contractual liability is based on the reasonable reliance that consensus has been reached, which the other contracting party (the contract denier) creates in the mind of the other (the contract asserter).

According to the *Sonap* case, the direct reliance approach involves a threefold enquiry:

1. Was there a misrepresentation regarding one party's intention?

2. Who made this misrepresentation?

3. Was the other party actually misled by this misrepresentation, and if so, would a reasonable person have been misled?

By signing the contract, Y, a party to the contract, misrepresented her intention to be bound by the clause allowing X to unilaterally change the dates. X knew that the only dates mentioned during negotiations were 24 to 27 July, that Y hastily signed the contract, and that the contract had a clause allowing X to unilaterally change the dates. X was probably not actually misled by the misrepresentation by Y, and nor would a reasonable person be misled in any event. There was therefore no reasonable reliance on consensus on the part of Y. Y is not bound by the agreement because of lack of apparent consensus.

Question 4

Andy and Jabu conclude a contract wherein Andy agrees to paint Jabu's office block by 31 August, and Jabu agrees to pay Andy R10 000 upon completion of the work. When 80% of the work is completed, Andy suddenly decides to go on vacation for a week and he is consequently unable to complete the job by 31 August. Jabu refuses to pay Andy any money for his (Andy's) services rendered. It will cost Jabu R3 000 to complete the job. Advise Andy as to what amount (if any) he may recover from Jabu for the services that he rendered and on what basis. Note that Jabu did NOT commit to a breach of contract by refusing to pay Andy. Do not apply the Consumer Protection Act 68 of 2008

This contract is reciprocal in nature. Andy has rendered defective performance and the issue is whether Jabu has to compensate Andy for the work that has already been done.

This question deals with the *exceptio non adimpleti contractus*. The *exceptio* is a defence that can be raised in the case of a reciprocal contract, where the performances due on either side are promised in exchange for one another. It is a remedy that permits a party to withhold their performance and ward off a claim for such performance until such time as the other party has either performed or tendered performance of their obligations.

Where a party who has to perform first has only performed part of its obligations or has

rendered defective performance, that party is in principle not entitled to claim counter-performance until such time as he has performed in full. In practice, the innocent party often accepts part-performance and starts using the performance. This sometimes leaves the breaching party in the unfair position that it may be impractical or impossible to make full performance, but any claim for counter-performance can be defended by the other party relying on the exceptio.

As a result, the courts have exercised a discretion to relax the principle of reciprocity and order the party making use of the defective or incomplete performance to pay a reduced amount to the party in breach.

In BK Tooling, the Appellate Division confirmed this, and held that the courts have an equitable discretion to award a reduced contract price, depending on the nature of the defect, and the cost of repair, replacement, or substitute performance. The onus to prove the amount of reduction is on the party in breach claiming the reduced price. The plaintiff must allege and prove:

- that the other party is using his performance
- the cost of remedying defects
- that it would be equitable to award some remuneration despite breach
- that the circumstances are such that the court should exercise its discretion

Based on the ruling in BK Tooling, Andy is entitled to be compensated by Jabu because:

1. Jabu is utilising the defective performance
2. It would be equitable as Andy has completed most of the work
3. The counter-performance ought to be reduced by R3000 (the amount it will cost to complete the job)

In the circumstances, Andy is entitled to receive R7000 from Jabu, which represents the difference between the contract price and the cost to complete

the job.

Question 5

X's lease of her flat comes to an end at the end of January 2019 and the lease cannot be renewed. X manages to lease a two-bedroom flat from Y for six months starting on 1 February 2019 for R5 000 per month. On 15 January 2018 Y phones X and tells her (X) that the flat is no longer available. X is devastated, but manages to fins a similar flat on very short notice in the same block of flates for lease Z's flat. No other suitable flat is available in the short period available to search for a flat. X cancels the contract of lease with Y and leases Z's flat for a period of six months at R6 000 per month. X finds out that Y leased his flat to B for R5 500. Can X claim contractual damages from Y and if so, for what amount? Substantiate your answer. **Do not apply the consumer protection act 68 of 2008**

The fundamental rule in regard to the award of damages for breach of contract, it has often been held, is that the innocent party should be placed in the position he or she would have occupied had the contract been properly performed, so far as this can be done by the payment of money and without undue hardship to the defaulting party. The aim, in other words, is to place the innocent party in his or her fulfilment position – that is, the position he or she would have occupied had there been no breach.

The application of the fundamental rule to a given set of facts entails a comparison between two financial positions of the plaintiff: the actual position in which the plaintiff now finds him or herself subsequent to the breach, and the hypothetical position he or she would have occupied had there been no breach. This method of quantifying the damage caused by a wrong is known as the difference theory.

Contractual damages are measured according to the plaintiff's positive or expectation interest, and include loss of profit, whereas delictual damages are measured by the plaintiff's negative or reliance interest, and are restricted to reliance or out of-pocket losses (wasted expenditure and the like).

Positive interest damages are forward looking, in that they aim to place the

plaintiff in the position he or she would have occupied had the contract been properly and timeously fulfilled; negative interest damages are backward looking in that they aim at placing the plaintiff in the position he or she would have occupied had he or she not entered into the contract at all.

Applying the difference theory to a claim for damages for breach of contract will, as a simple matter of causation, produce a forward-looking result: but for the breach, the plaintiff would have been in the fulfilment position; and if he or she would have made a profit on the transaction, his or her damages will include this expectation loss, in addition to any reliance losses he or she might have suffered as a result of the breach.

Applying the difference theory to a claim for delictual damages on the grounds of a pre- contractual wrong such as fraud that induced the contract (dolus dans) will, again as a simple matter of causation, produce a backward-looking result: but for the fraud, there would have been no contract at all; had the plaintiff not entered into the contract, he or she would not have incurred the expenditure that is now wasted, but by the same token he or she could not have made any profit on the transaction. The plaintiff's damages are thus restricted to his or her reliance losses.

<u>Application to the facts</u>

Contractually, X will be able to claim the damages from Y, the difference that which but for the breach of contract by Y. Had Y not breached the contract X would be paying R5000 not R6000. The difference which is R1000. X will be able to claim R1000 from Y. Notwithstanding the fact that Y's new tenant is only paying R5500 we are looking at X's position. Had Y not breached the contract which position would X be in.

OCTOBER / NOVEMBER 2018

SECTION A

An absolving agreement is an agreement

1. only creating obligations
2. whereby a right is transferred
3. **extinguishing or discharging obligations**
4. an example of which is cession
5. that cannot entail the transfer of ownership of property

A negligent misrepresentation renders a contract

1. void
2. void without a claim for damages
3. unenforceable
4. **voidable**
5. neither void nor voidable, but it does give rise to a claim for damages

Which of the following is **NOT** a requirement for the creation of a valid contract?

1. The minds of the parties must always actually meet
2. The performance must be possible at the time of conclusion of the contract
3. **The contract must be clean**
4. The contracting parties must have capacity to act
5. The prescribed formalities must be complied with

Essentialia are

1. all the terms of a contract apart from the *naturalia* and *incidentalia*
2. **terms that identify a contract as belonging to a particular class of contracts**
3. terms automatically imposed by law on the contracting parties unless contracting parties expressly exclude them
4. all the terms of a contract apart from the *naturalia*
5. all the material terms and conditions of a contract

Which statement(s) is/are **CORRECT?**

1. **Commercial bribery can lead to a claim for the setting aside of the contract and restitution**

2. Commercial bribery amounts to undue influence
3. Commercial bribery amounts to an abuse of circumstances
4. **Option 1 and 3**
5. Option 2 and 3

The notion that contracts are based on the concurring declaration of the parties, has given rise to which theory?

1. The expedition theory
2. The will theory
3. The reliance theory
4. The reception theory
5. **The declaration theory**

An item displayed in a shop window, accompanied by presentation of payment for the item by a customer,

1. **usually results in a contract being concluded because an offer and acceptance exists**
2. effectively means that the shop keeper is the offeror
3. effectively means that the customer is the offeree
4. usually results in the customer merely indicating an invitation to do business
5. means that option 1, 2 and 3 are correct

Which theory finds application under the Electronic Communications and Transactions Act 25 of 2002?

1. The declaration theory
2. The expedition theory
3. The information theory
4. **The reception theory**
5. The reliance theory

X makes an offer to sell her watch to Y for R 2 500. X and Y agree on 15 May that X's offer will be open for acceptance until 31 May. On 20 May X informs Y in writing that she (X) intends to sell the watch to Z on 30 May. On 21 May Y informs X that she (Y) accepts the offer, but X refuses to sell the watch to her (Y). Which statement is **CORRECT?**

1. X and Y concluded a pre-emption contract on 15 May
2. X and Y concluded a pre-emption contract and an option contract on 15 May
3. X and Y concluded a pre-emption contract on 21 May
4. X and Y concluded an option contract on 21 May

5. **X and Y concluded an option contract on 15 May**

Assume the same facts as in question 9 Y wants to compel X to sell the watch to her. How would you best advise Y?

1. Cancel the contract and seek to interdict X from selling the watch to Z
2. **Enforce the contract and seek to interdict X from selling the watch to Z**
3. Cancel the contract and seek an order for specific performance against X
4. Enforce the contract and cancel the contract simultaneously through the use of an interdict
5. Cancel the pre-emption agreement between X and Z

Which statement relating to the Bill of Rights in the Constitution of the Republic of South Africa, 1996, is **CORRECT?**

1. Vertical application relates to relationships between private persons, as in most contractual situations
2. Horizontal application relates to relationships between the state and the individual
3. In *Barkhuizen v Napier* 2007 (5) SA 323 (CC), the majority in the Constitutional Court ruled that a contractual term can be tested directly against a provision in the Bill of Rights
4. In *Barkhuizen v Napier* 2007 (5) SA 323 (CC), the minority in the Constitutional Court preferred an indirect application of the Constituition to the contractual dispute before them
5. **In *Barkhuizen v Napier* 2007 (5) SA 323 (CC), Ngcobo J reasoned that the proper approach to constitutional challenges to contractual terms, is to determine whether the term challenged is contrary to public policy, and what constitutes public policy must be discerned with reference to the fundamental values embodied in the Constitution**

X has a watch that Y likes. X and Y agree that if X ever sells her watch, she will offer to sell it first to Y for R 5 000. This is a case of

1. **a pre-emption formed bilaterally**
2. a pre-emption formed unilaterally
3. an option formed bilaterally
4. an option formed unilaterally
5. both an option and a pre-emption

X is engaged to Y. X has a very strong personality and eventually persuades his fiancé, Y, to sell and transfer her house that is worth R 900 000 to him (X) at a purchase price of a mere

R20 000. After registration of the property in X's name X breaks off the engagement. Which of the following requirements **MUST** Y prove in terms of the positive law, in her pursuit to have the transfer of the house into X's name set aside?

1. X obtained an influence over Y
2. X gained this influence by standing in a position of trust in relation to Y
3. X exercised this influence over Y, in an unscrupulous manner in order to induce Y to consent to a transaction which is to Y's detriment and which Y, with her normal free will, would not have concluded
4. This influence exercised by X over Y, amounted to intimidation which was contrary to good morals
5. **Option 1, and 3**

X rents a house from Y for R10 000 per month until such time as his employer transfers him to Cape Town. This lease is subject to a

1. suspensive time clause
2. resolutive time clause
3. suspensive condition
4. **resolutive condition**
5. modus

X donates R 100 000 to the Salvation Army for the purpose of looking after homeless people. The obligation to pay R 100 000 is subject to a

1. **modus**
2. supposition
3. suspensive condition
4. resolutive condition
5. positive condition

X agrees to buy Y's horse, Big Donald, for R200 000 only if X's horse is dead. This is a contract of sale subject to a

1. common error
2. supposition
3. **suspensive condition**
4. resolutive condition
5. negative condition

Y sells his cat, Felix, to Z for R 1 000 on 15 January. Delivery is to take place on 17 January. Y kills the cat on the 16 January when he intentionally drivers over the cat with his car. This is a case of

1. mutual mistake
2. impossibility of performance
3. supervening impossibility of performance
4. **prevention of performance**
5. common mistake

C, a builder, and O agree that C will build a house on O's stand for R 800 000, payable on completion of the house. The house must be completed by 30 April, but on that date the house is only 90% complete. It would cost R 100 000 to complete the house. O refuses to pay any amount to C because C failed to complete the house timeously. If C institutes legal proceedings against O for payment, which defence is O likely to raise?

1. The *exception doli*
2. The *pactum de contrahendo*
3. **The *exceptio non adimpleti contractus***
4. The *stipulation alteri*
5. The *pacta sunt servanda*

Assume the same facts in question 18. The contract between the parties is a

1. unilateral contract that is a reciprocal contract
2. unilateral contract that is not a reciprocal contract
3. **bilateral contract that is a reciprocal contract**
4. bilateral contract that is not a reciprocal contract
5. contract that is both unilateral and bilateral

A term implied *ex lege* into a contract

1. is imported into a contract by law and operates, unless the parties exclude it
2. is imported into a contract by the parties and operates, unless the law operates to exclude it
3. is also knows as a *naturalium (singular or naturalia)* if it is implied by the common law
4. is a tacit term
5. **option 1 and 3**

The auction of a Porsche Carrera (a type of sports car) is advertised in the newspaper. The auction is to take place on the 1 May. On 1 May X, the auctioneer, announces before the

start of the auction that the auction will be subject to reserve and that the successful bidder must pay the price cash on delivery. Y is the highest bidder. Which of the statements is **INCORRECT?**

1. X may validly call of the auction any time before the start of the auction on 1 May
2. **Y is not bound by the condition that the successful bidder must pay the price cash on delivery because this condition has not been announced in the advertisement**
3. X may not change the conditions of the auction after the first *bona fide* bid has been made
4. Y may retract his bid before the hammer falls, because Y makes an offer to buy the car by bidding
5. X may refuse to accept Y's offer if Y's bid is lower than the reserve price

Which theory must be applied to determine when and where a contract arose in the case of a contract concluded by post?

1. The declaration theory
2. The reliance theory
3. **The expedition theory**
4. The reception theory
5. The information theory

X is desperate to sell her house because of a termite infestation. Consequently she knowingly conceals all signs of damage when a potential purchaser, Y, comes to inspect the house. Y purchases the house, which she (Y) would never have done if she (Y) knew of the termite infestation. What cause of action will Y be able to rely on in the circumstances?

1. *Simplex commendatio*
2. *Dictum et promissum*
3. **Fraudulent misrepresentation**
4. **Duress**
5. **Puffery**

Assume the same facts as in question 23. What remedy or remedies are available to Y when she discovers the termite infestation and damage to the house?

1. Y may only rescind the contract
2. Y may only uphold the contract and claim damages
3. Y may rescind the contract and claim damages
4. Y may uphold the contract and claim damages
5. **Both 3 and 4**

Cession is the transfer of

1. real rights
2. duties
3. immaterial rights
4. personal rights
5. **both personal rights and duties that arise out of obligations**

SECTION B

QUESTION 1

X finds himself stranded in the remote Richtersveld when his 4x4 vehicle breaks down. There is no cell phone reception in the area. After five days have passed without seeing anyone, Y comes along and offers to tow X to the nearest town for the exorbitant fee of R20 000, because Y knows that X is running low on food and water. X accepts Y's offer. Is X bound by the contract? Discuss

According to *Blackburn v Mitchell* when a person is in an emergency and has no choice but to enter into an agreement it is regarded as abuse of circumstance. Our common law on the point is by no means clear, but the general tenor appears to be that the contract is enforceable. Pothier states that the agreement is valid but that the promised performance of the victim must be reduced to what is reasonable.

Our common law on the point is by no means clear, but the general tenor appears to be that the contract is enforceable. The agreement is valid but the promised performance of the victim must be reduced to what is reasonable.

QUESTION 2

X buys an examination paper from Y, a fellow student, for R5 000. Y stole the paper out of his lecturer's office. X pays Y R5 000. Both parties know that using the examination paper to pass the examination would amount to committing the crime, fraud X's conscience troubles him and he destroys the paper without looking at it. X wants to claim back the purchase price from Y. Advise X

The ***par delictum* rule**, *in pari delicto potior est conditio possidentis* (where two parties are equally morally guilty, the one who is in possession is in the stronger position) will prevent restitution from taking place. This rule does not preclude the enforcement of an unlawful contract by means of a claim for specific performance (that is the function of the *ex turpi* rule), but it does prevent a party from reclaiming his or her performance in terms of an unlawful contract. The *par delictum* rule is based on two considerations of

public policy: a court will not assist those who approach it with 'unclean hands', and unlawful contracts should be discouraged.

The *par delictum* rule only applies where the parties are equally 'guilty' in concluding an illegal agreement. Accordingly, the rule will not apply where the plaintiff is less guilty than the defendant or is not morally guilty at all. A plaintiff's guilt is diminished, for example, where he or she did not know of the illegality of the contract or is reclaiming money paid to a blackmailer. The *par delictum* rule may sometimes operate very harshly towards a party who claims the return of his or her performance.

Consequently, in *Jajbhay v Cassim*,the Appellate Division held that this rule may be relaxed in appropriate circumstances in order to do justice between the parties. The underlying principle of the *par delictum* rule is public policy, but public policy also demands that 'justice shall be done between man and man'. The court considered the facts of the case. A sub-lessor applied for the ejectment of a sub-lessee on the ground that the sub-lease was illegal. Both parties were criminal offenders by being parties to the sub-lease. The sub-lessor did not terminate the lease with a month's notice as provided for in the illegal contract, while the sub- lessee complied with his obligations under the lease. Neither party was enriched at the expense of the other party. The court consequently refused to relax the rule.

<u>Application to the facts</u>

X will not be able to claim back his money from Y because both of them are equally guilty.

QUESTION 3

X takes his motor vehicle to Dodgy Motors for a service. On his arrival, he is asked to sign a "job card" by the owner X enquires why he is required to sign the "job card" and the owner explains to him that by signing he is authorising them to conduct the service on his car which will cost R 1 000. He signs the "job card" without reading it. While servicing the car, the service manager finds faults on the car (unrelated to the service) and he proceeds to do these additional repairs for a further R2 000. X refuses to pay for the additional repairs and argues that he did not authorise such repairs. The owner of Dodgy Motors argues that X is obligated to pay for the work done as the "job card" contains a contractual clause authorising Dodgy Motors to do any repairs on the motor vehicle which they deem necessary without asking the client's authorisation and requiring the client to pay for such repairs. Advise X on whether he is liable on the contract to pay Dodgy Motors R2 000 for the additional repairs. Do not apply the Consumer Protection Act to this question.

The essence of this problem is the question whether X and the owner of Dodgy Motors have reached actual consensus or ostensible consensus. Albert

will not be contractually bound to pay for the additional repairs if this requirement for a valid contract is absent.

At the outset, it must be determined whether agreement (*consensus ad idem*) as a contractual basis exists between the parties, as required in terms of the will theory. Consensus has three elements:

1. The parties must seriously intend to contract
2. The parties must be of one mind as to the material aspects of theproposed agreement (the terms and the identity of the parties to it)
3. The parties must be conscious of the fact that their minds have met

In the present case, the parties were not in agreement as to the consequences

they wished to create; X thought that he was authorising Dodgy Motors to only service his car, while the owner of Dodgy Motors knew that the contract also allowed Dodgy Motors to conduct repairs which they deemed necessary and payable by Albert without any further authorisation "The expert in anything was once a beginner"

from X. This is a mistake as to the obligations the parties wished to create and is thus a material mistake, which excludes consensus between the parties. This means that no contract could arise on the basis of the will theory.

This type of mistake can be illustrated with a number of cases:

In *George v Fairmead*, the appellant signed a hotel register without reading it. The register contained a term excluding the respondent from liability for certain acts. The appellant was unaware of this term and his mistake related to a term that he believed would not be in the contract and as such was material because it related to an aspect of performance.

In *Allen v Sixteen Stirling Investments*, the plaintiff believed he was purchasing the erf pointed out to him by the seller's agent, while the written contract that he signed indicated the correct erf, which was a completely different property. His mistake related to performance and was material.

However, the matter does not end here. A party may be held contractually liable on the basis of a supplementary ground for liability, namely the reliance theory. In this regard, the direct or indirect approach to the reliance theory may be considered.

<u>Direct approach:</u>

With reference to the direct approach, contractual liability is based on the reasonable reliance that consensus has been reached, which the one contractant (the contract denier) creates in the mind of the other contractant (the contract enforcer).

According to the *Sonap* case, the direct reliance approach entails a threefold enquiry:

1. Was there a misrepresentation regarding one party's intention?
2. Who made the misrepresentation?
3. Was the other party misled by the misrepresentation, and if so, would areasonable person have been misled?

In our question, firstly, X made a misrepresentation by signing the contract, that his intention is the same as that expressed in the contract.

Secondly, the owner of Dodgy Motors could actually have been misled by this misrepresentation, but a reasonable man would have taken steps to point out to Albert that the contract allows Dodgy Motors to unilaterally conduct repairs on the car, because X enquired about the purpose of the "job card" and the owner of Dodgy Motors misled him to believe that by signing the card he is merely authorising the service to be done. In *Sonap* the court found that the contract enforcer knew that the contract denier was acting under a mistake and was thus not misled.

In our case, X therefore did not create a reasonable reliance that he wished to be bound by the contract he signed.

<u>Indirect approach (iustus error doctrine):</u>
In terms of this approach, a party may escape liability to be bound to a contract if it can be established that the mistake is both:

1. Material, and
2. Reasonable

It has already been shown in the discussion above that X mistake is material. It still has to be determined if his mistake was reasonable.

The contract denier's mistake will be reasonable in the following instances:

1. If caused by a misrepresentation on the part of the contract enforcer (anunlawful misrepresentation).

2. If the contract denier is not to blame for the mistake.

3. If the contract denier did not cause a reasonable belief in the contract asserterthat the contract denier assented to the agreement.

Fault is not a requirement for the misrepresentation by the contract enforcer, but unlawfulness is. If the misrepresentation is a positive act it is unlawful in itself. If a legal duty to speak exists and the party has kept quiet when he ought to have spoken, an unlawful negative misrepresentation has occurred. A legal duty to speak exists in the following instances:

- Where the contract asserter knows or ought to know as a reasonable person thatthe other party is mistaken

- Where, prior to the conclusion of the agreement, the contract asserter created an impression directly conflicting with the provisions of the agreements, he must drawthe contract denier's attention to the discrepancy (*Du Toit v Atkinson's Motors*).

In our problem, X enquired about the purpose of the "job card" and the owner of Dodgy Motors misled him by answering that by signing he was merely authorizing the service.

The owner's misrepresentation was a positive act, and was therefore unlawful X error was thus reasonable. "The expert in anything was once a beginner"

Applying the indirect approach to the reliance theory we do not have a valid contract. Applying the direct approach, we do not have a valid contract. X is not contractually liable to pay R2000 for the repairs.

QUESTION 4

On 1 June M and Q conclude a contract whereby M undertakes to manufacture and install kitchen cupboards in Q's home for R50 000. The parties agree that the price will be paid as soon as the kitchen cupboard units are installed, but they do not determine a date for the completion of the work. M, however, informs Q during the negotiations that she has some other work to complete and that she will attend to the kitchen cupboards as soon as possible. Two weeks has lapsed since the conclusion of the contract and Q has not heard from M. Q runs out of patience, cancels the contract with M and hires W to manufacture and install the same kitchen cupboards for R60 000. After W has completed the job, M turns up to do the work. Did Q validly cancel the contract? Discuss

Not a valid cancelation. No date set for performance therefore cannot cancel without notice.

If the innocent party elects to cancel the contract, he or she must notify the other party of his or her decision, and the **notice of cancellation** must be clear and unequivocal. The cancellation takes effect only when it has been communicated to the party in breach; and it cannot be worded so as to take effect only from a future date. There are no formalities required for the act of cancellation; a simple oral or written notice will suffice, unless the contract itself or a specific statute stipulates otherwise. Nor is there any need for a court order, since the act of cancellation is that of the innocent party rather than that of the court; but if the other party disputes the validity of the cancellation, it might be necessary to obtain a court order confirming that the contract has indeed been cancelled.

Where the contract prescribes the steps to be taken to cancel the contract, the innocent party must follow those steps to effect a valid cancellation. The notice of cancellation will usually state the grounds on which the contract is being cancelled. Provided that a good reason for cancellation does in fact exist, the cancellation will be effective despite the fact that the innocent party has relied upon a wrong reason. A premature cancellation is of no immediate force or effect (it might even

constitute a repudiation in itself), but if a good ground for cancellation subsequently arises and it is clear that the innocent party persists in his or her original attitude, there is no need for a fresh notice of cancellation.

The notice takes effect from the time it is communicated to the party in breach. If no notice has been given, notice of cancellation will take effect on service of summons or notice of motion.

QUESTION 5

Assume the same facts as in question 4. Also assume that Q did not validly cancel his contract with M. Did Q breach the contract? Discuss

Yes, Q committed prevention of performance. Prevention of performance is a breach whereby, after conclusion of the contract, one of the parties, owing to their fault, causes performance to become impossible. In the scenario provided in the question the Q has made it permanently impossible for M to perform by getting W to manufacture and installing the same kitchen cupboards. Therefore Q is breach because it is impossible for M render performance in accordance with the initial agreement between Q and M.

It is also important to note that breach of contract in this instance is not in the form of Mora debitoris even though the breach is related "timeous performance" .This is because the requirements for default of the debtor are that, the debt must be due and enforceable, secondly the time for performance must have been fixed, either in the contract or by a subsequent demand for performance, and the debtor must have failed to perform timeously; and lastly such failure to perform on time must be without lawful excuse. Looking at the second requirement the agreement between Q and M had no fixed date for performance neither was the performance demanded hence mora debitoris as breach falls away.

With regards to prevention of performance is not necessary that the

performance should be objectively impossible in order for the breach to arise subjective impossibility will be enough. In other words, the breach is committed even when the impossibility attaches only to the particular debtor.

Performance may be rendered impossible, not only by the debtor, but also by the creditor (for example, A employs B to repair his stove, but before B can do the repairs, A sells the stove to C, or dispatches it to the junkyard). Such a situation should not be confused with mora creditoris where, despite the creditor's delay in lending his or her cooperation, performance remains possible (for example, B arrives at A's house on the appointed day to repair the stove, only to find that A has locked the house and gone away for a week).

Under these circumstances performance is no longer possible and therefore .

QUESTION 6

Assume the same facts as in question 4. Also, assume that Q breached the contract by cancelling the contract with M and that M wishes to institute a claim for damages against Q. M would have paid her employees R 10 000 as salaries and would have spent R20 000 on the material to manufacture the cupboards. Will M succeed in her claim and what amount would she be able to claim? Discuss

In terms of the difference rule the extent of the plaintiff's patrimonial or financial loss is determined by comparing the patrimonial position he or she presently occupies after the breach with the hypothetical patrimonial position he or she would have occupied had the contract been properly performed.

The courts often use a more concrete approach in determining the quantum by focusing on the actual element of the patrimony that is affected. According to this approach, damage is calculated by comparing the value that the asset or obligation would have had if the contract had been properly performed, with its actual value after the breach.

Thus, the approach focuses on the specific asset or right and not on the patrimony as a whole.

In practice, the quantification will depend on the nature of the loss that has occurred. For example, the amount of damages may be determined with reference to:

- the market value of the defective goods received as compared with the marketvalue of the goods without the defect;
- the cost of repairing a defective performance or object to make it conform withthe requirements of the contract;
- **the amount of profit that a retailer could have made, but lost due to the breach;**
- the cost of completing an incomplete performance;
- the additional price that must be paid for replacement goods, where defectivegoods are rejected or where the contract is cancelled; and
- interest paid on an overdraft by the innocent party, where late payment is made.

The financial loss or damage suffered by the plaintiff must have been caused by the breach (causation). The relevant principles to the enquiry into causation were authoritatively set out in *International Shipping Co (Pty) Ltd v Bentley*. The enquiry entails a two-stage process:

1. firstly, one asks whether as a matter of fact the breach causally contributed to the loss in question; and
2. secondly, if the first question yields a positive answer, one asks whether, as amatter of law, the causal connection between the breach and the loss is sufficiently close that the party in breach should be held

responsible for it.

The reason for the distinction between factual and legal causation is that a breach of contract, like a delict, can give rise to a multitude of consequences, some of which might be quite unexpected. As a matter of fairness, the defendant cannot be held liable for all these consequences, no matter how remote they are from the breach. The requirement of legal causation serves the purpose of cutting the causal chain at an appropriate point, and thereby limiting the liability of the defendant.

Factual causation. This is established by means of the 'but-for' test (or conditio sine qua non test). The test enquires whether the loss in question would have been suffered had the breach of contract not been committed. If, but for the breach, the loss would not have been suffered, the breach is a factual cause of the loss; conversely, if the loss would in any event have been suffered, the breach is not a factual cause of the loss. The innocent party needs to prove, on a balance of probabilities, that the loss would not have been suffered, but for the breach. If it fails to establish this causal link, that is the end of the enquiry and the damages claim must fail.

Legal causation. The aim is to protect the party in breach from liability that is too wide ranging and unreasonable. The test for legal causation turns on the issue of remoteness
– that is, whether the causal connection that exists between the breach and the loss is sufficiently close to justify the imposition of liability.

The approach to remoteness has traditionally been based on a distinction between general and special damages. In terms of the traditional approach, general damages flowing from the breach of contract are not too remote and hence are recoverable as a matter of course; special damages, on the other hand, are presumed to be too remote unless exceptional circumstances are present. General damages,

then, are those that flow naturally and generally from the kind of breach in question. They are the sort of damages that might be expected in the ordinary course of things to result from the breach. As such, they would have been foreseeable to a reasonable person entering into the contract as a probable consequence of the breach in question.

Application to the facts

In the given scenario M would have paid his employees R10 000 and bought materials of manufacturing the cupboard for R20 000 but for the breach of contract by Q. M will succeed in claiming these amounts if he proves that they are general damages flowing directly from the natural breach of the contract and that they are not too remote. Q cannot be blamed for the salaries of M's employees, that is too remote to impute on Q. If M were to buy the materials for manufacturing the cupboards that would not have put him in a better position because he was going to use all the material in manufacturing Q's cupboards. It stands to reason that M will not be able to claim any damages from Q.

MAY / JUNE 2018

SECTION A

X buys Y's car for R50 000. X pays the purchase price and Y delivers the car to X. Y has the intention to transfer ownership and X has the intention to receive ownership. What type of agreement(s) did X and Y conclude when Y delivered the car to X?

1. A contract
2. An agreement extinguishing a debt
3. **A real agreement**
4. **Option 2 and 3**
5. Option 1, 2 and 3

X and Y conclude a contract. When will their contract be **VOID?**

1. **The conclusion of the contract is expressly prohibited by legislation as a crime**
2. X operates under an error in motive
3. X threatens to kill Y if she does not conclude the contract
4. X made an intentional misrepresentation to Y before the conclusion of the contract
5. X made a *dictum et promissum* to Y before the conclusion of the contract

X advertises his car in the newspaper as follows

"Hyundai i10 Price. R100 000. 2015 model 20 000 km. Mint condition. Phone X at 073 576 95" . Y phones X, who is in Johannesburg and offers to buy the car. X accepts Y's offer. Y, who is in Cape Town, hears X's acceptance of Y's offer. Which statement is **CORRECT?**

1. A mere acceptance of the advertisement by Y would create a valid contract of sale
2. The statements regarding the year model, mileage and condition of the car are mere puffing
3. The contract of sale is concluded in Cape Town
4. **The contract of sale is concluded in Johannesburg**
5. Option 1 and 3

Liability for which form of misrepresentation may **NOT** be contractually excluded?

1. An innocent misrepresentation
2. A negligent misrepresentation
3. A grossly negligent misrepresentation
4. **A fraudulent misrepresentation**
5. A *dictum et promissum*

S illegally sells uncut diamonds to P for R10 000. Both S and P know that the selling of uncut diamonds is prohibited by statute. Although S delivers the diamond to P, P fails to pay the purchase price. Which statement is **CORRECT?**

1. S will be able to claim the purchase price from P.
2. **The contract sale is void because of illegality.**
3. The contract of sale is voidable because of illegality
4. S shall be able to claim return of the diamonds from P with an enrichment action, because the court as a rule will relax the *par delictum* rule

Which of the following is **NOT** a requirement for the creation of a valid contract?

1. The prescribed formalities must be complied with
2. **The performance must be possible after the contract is concluded**
3. The contract must be certain
4. The contracting parties must have capacity to act
5. There must be agreement or apparent agreement between the parties

X and Y agree that should X sell her car, she (X) will offer to sell it to Y first, before making an offer to sell the car to any other person. X sells the car to Z for R50 000 without first offering it to Y for sale. Delivery of the car has not yet taken place. Which statement is **INCORRECT?**

1. **X gave Y an option to purchase her (X's) car**
2. X gave Y a right of pre-emption with regard to her (X's) car
3. X can step into the shoes of Z with a unilateral declaration of intent
4. Both Y and Z only have personal rights against X
5. The personal right of Y enjoys preference above the personal right of Z

Essentialia are:

1. All the terms of a contract apart from the *naturalia*
2. **Terms that identify a contract as belonging to a particular class of contracts**
3. Terms automatically imposed by law on the contracting parties unless contracting parties expressly exclude them
4. All the terms of a contract apart from the *incidentalia*
5. Material terms and conditions of a contract

X sells land to Y subject to the existence of pumping rights from a stream. Such item is a

1. warranty
2. unilateral mistake
3. **suspensive condition**
4. supposition
5. **protestative suspensive condition**

X finds himself stranded in the remote Richtersveld when his 4x4 vehicle breaks down. There is no cell phone reception in the area. After five days have passed without seeing anyone, Y comes along and offers to tow X to the nearest town for the exorbitant fee of R20 000, because Y knows that X is running low on food and water. X accepts Y's offer. Y's conduct will probably amount to

1. undue influence
2. duress
3. **abuse of circumstances**
4. option 1 and 3
5. option 1, 2 and 3

In which instance has consensus been obtained improperly?

1. A common error
2. Rectification
3. An error in negotio
4. A threat that is not related to an imminent or inevitable evil
5. **A negligent misrepresentation**

S informs P that there are 1 000 fruit trees on his (S's) farm, as a result of which P buys the farm from S for R8 000 000. S knows that there are only 800 fruit trees on the farm. This is a case of

1. an error in negotio
2. a fraudulent misrepresentation
3. **a negligent misrepresentation**
4. option 1, 2 and 3
5. none of the above

Assume the same facts as in question 12. The market value of the farm is R7 800 000. P claims R200 000 from S. P's claim against S is based on

1. **delict**
2. breach of contract
3. unjustified enrichment
4. monetary compensation
5. all the above

Y sells his cat, Felix, to Z for R1 000 on 15 January. Delivery is to take place on 17 January. Lightning kills the cat on 16 January. This is a case of

1. mutual mistake
2. impossibility of performance
3. **supervening impossibility of performance**
4. prevention of performance
5. common mistake

X sells his car to Y for R50 000 and undertakes to deliver the car to Y tomorrow morning. The obligation to deliver the car is subject to a

1. **suspensive time clause**
2. resolutive time clause
3. suspensive condition
4. resolutive condition
5. modus

X sells his car to Y for R50 000 if it rains in the Karoo next Monday. This is a contract of sale subject to a

1. suspensive time clause
2. resolutive time clause
3. **suspensive condition**
4. resolutive condition
5. modus

Which of the following statements regarding tacit terms is **INCORRECT?**

1. The courts often employ the officious bystander test in determining whether a contract contains a tacit term
2. Tacit term will only be read into a contract if they do not conflict with any of the unambiguous express terms of the contract

3. Tacit terms will only be read into a contract if it is necessary in a business sense to give efficacy to the contract.
4. Tacit terms must be capable of a clear and exact formulation
5. **Tacit terms are the *naturalia* of the contract**

Which of the following must a party prove who seeks to set a contract aside on the ground of undue influence?

1. The other party obtained influence over her
2. The other party exercised this influence over her, in an unscrupulous manner in order to induce her to consent to a transaction which is to her detriment and which she, with a normal free will, would not have concluded.
3. The other party gained his influence over her by standing in a close relationship to her.
4. **Options 1 and 2**
5. Options 1, 2 and 3

Y sells his car to Z for R20 000 on 15 January. Y undertakes to deliver the car to Z on 17 January, but Z fails to accept delivery of the car. This failure of Z amounts to

1. **mora *creditoris***
2. subjective impossibility of performance
3. subjective supervening impossibility of performance
4. *mora debitoris*
5. prevention of performance

B, a builder, and O agree that B will build a house on O's stand for R 800 000 and that B will only be paid after completion of the house, which must be later than 1 August. On 1 August, the house is only 20% complete. O refuses to pay B any money, because B is in breach of contract. O's refusal amounts to

1. repudiation
2. positive malperformance
3. prevention of performance
4. ***mora debitoris***
5. none of the above

Which statement is **INCORRECT?**

1. A contract can be a bilateral juristic act
2. A contract entails promises or undertakings on one or both sides

3. An undertaking in a contract that a certain state of affairs exists, or has existed, is known as a warranty
4. **The conclusion of a contract can never be multilateral**
5. Freedom of contract means that the parties can agree to anything that is possible and lawful

Which of the following does **NOT** lead to the termination of an offer?

1. **Extension of the time set for acceptance of the offer**
2. Rejection of the offer
3. Death of either the offeror or the offeree
4. Effluxion of the prescribed time, or of a reasonable time
5. Revocation of the offer

Which statement regarding cancellation for breach of contract is **INCORRECT?**

1. Where a party has a right to cancel a contract, he/she has an election either to affirm or to cancel the contract
2. A party may cancel a contract where the breach of contract on the part of the other party is material
3. A party may cancel a contract where provision has been made in the contract for a right to resile in the circumstances that exist
4. **Cancellation can be claimed with the *actio quanti minoris***
5. Cancellation of a contract is available to a party only in exceptional circumstances

What is the general effect of supervening impossibility of performance?

1. **Termination of the contractual obligation**
2. The contract is rendered voidable at the instance of the creditor
3. The contract is rendered voidable at the instance of the debtor
4. The creditor is guilty of contractual breach
5. The debtor is guilty of contractual breach

X owes R700 to the municipality for electricity used in September. It turns out that the municipality owes X R400 as it over-charged him in respect of electricity used in August. X therefore only pays the municipality R300. This is a case of

1. novation
2. release
3. merger
4. **set-off**
5. compromise

SECTION B

QUESTION 1

Y signs and couriers a written offer (including all the material terms) to Z on 1 July, for the purchase of Z's apartment. Y offer is for R 800 000 and one of the terms of the offer states "This offer lapses on 30 August." Z accepts the offer by signing the contract. Z posts the contract to Y on 28 August. The letter reaches Y on 1 September. Y immediately opens the letter and notices that Z has signed the contract. Did Y and Z conclude a valid contract of sale? Discuss. You may accept that the contract complies with the required formalities.

Because the parties are not in each other's presence and there is a lag in time between the offer and the time that the offeror learns of the acceptance it is difficult to determine exactly the place and time of the conclusion of the contract. Various theories have been put forward to determine exactly when this occurs such as *inter alia* declaration, expedition, reception and the information.

The information theory would seem to be the most appropriate theory which provides that agreement is concluded when the offeror has been informed of the acceptance that is when Y reads Zs acceptance.

However according to the Cape explosives case it was decided that agreement's entered into by letter arise at the place and the moment when the letter of acceptance is mailed which is consistent with the expedition theory and this seems to stand as authority with regards agreements concluded via post.

Since the letter was posted on 28 August before the lapse of the offer a valid contract was concluded on application of the declaratory theory as applied in the cape explosives case.

QUESTION 2

X is employed as a bookkeeper in Y's business. X steals money from the business's bank account over a long period of time. Y gets forensic auditors in and they determine that X has stolen R50 000. Y confronts X and threatens to lay a charge of theft against X at the police station unless X signs an acknowledgement of debt of R60 000. X signs because he is afraid to go to jail. Did a valid contract arise? Advise Y. Substantiate your answer.

Duress is improper pressure that amounts to intimidation. A party who gives his or her consent to a contract under duress does so, not through the free exercise of his or her own will, but through fear inspired by an illegitimate threat. Apart from the very rare cases where the fear is so extreme as to exclude consensus altogether, a contract induced by duress is valid since, in the eyes of the law, a forced consent is none the less an effective consent. However, in view of the fact that the consent was obtained by improper means, the contract is voidable at the option of the threatened party. He or she may thus set aside the contract, if he or she so wishes, and claim restitution of what he or she has given, or may resist the enforcement of the contract by the other party; and in any event he or she may also in a proper case recover damages since, like fraud, duress is a delict giving rise to the Aquilian action.

For these consequences to arise, however, it is essential that the threat should be both unlawful and an effective cause of the contract in the sense that, but for it, the threatened party would not have contracted at all, or at least not on the terms that he or she did.

Elements:

1. Actual violence or reasonable fear.

2. The fear must be caused by the threat of some considerable evil to the party orhis family.

3. It must be the threat of an imminent or inevitable evil.

4. The threat or intimidation must be contra bonos mores.

5. The moral pressure used must have caused damage.

Application to the facts

Yes, a valid agreement has been created to extinguish the debt incurred. It is avoidable contract at the expense of the threatened party (X) who may either rescind or uphold the contract. If X wants to rescind the contract he must prove the above requirements of duress. X was threatened by Y and as a result he signed a contract that which on his free will he would not have signed.

QUESTION 3

X is an amateur golfer. She is not informed about the rules pertaining to her amateur status as a golfer and does not know that amateurs can only claim a maximum of R1 000 in prize money at golf tournaments. X participated in a recent golfing tournament wherein she achieved a hole-in-one at the 9th hole. At this hole was an advertising board, which read "Hole-in-one prize sponsored by Speedy Motors to the value of R90 000". The prize was parked next to this board in the form of a new car. X claimed the prize from Speedy Motors but they rejected her claim on the basis that the prize could only be claimed by professional players and not amateur players. Did a valid contract arise? Substantiate your answer.

This problem deals with two questions: Was there a valid offer and acceptance? Was there consensus between the parties?

Offer and acceptance:

The general rule in our law is that an advert constitutes merely an invitation to do business (*Crawley v Rex*). However, following the reasoning in *Carlill v Carbolic Smoke Ball Co*, the court in *Bloom v*

American Swiss Watch Co held that the advertising of a reward might be construed as an offer to the public.

An offer may only be accepted by a person or persons to whom it was directed (*Bird v Summerville*). Although Speedy Motors intended the offer to be open only to professional players, the expressed offer was apparently open to the public. Mistake is thus also relevant.

Mistake:

At the outset, it must be determined whether agreement (*consensus ad idem*) as a contractual basis exists between the parties, as required in terms of the will theory. Consensus has three elements:

1. The parties must seriously intend to contract

2. The parties must be of one mind as to the material aspects of theproposed agreement (the terms and the identities of the parties to it)

3. The parties must be conscious of the fact that their minds have met

In our case, X and Speedy Motors were not in agreement as to the identity of the parties, and this is a material mistake, which excludes consensus based on the will theory.

However, the matter does not end here. A party may be held contractually liable on the basis of a supplementary ground for liability, namely the reliance theory. In this regard, the direct reliance approach or the indirect reliance approach may be considered.
Because the facts in this case are similar to the case of *Steyn v LSA Motors* where it was held that the indirect approach couldn't be applied in instances where there isno objective appearance of agreement, only the direct approach will be considered.

Direct approach:

With reference to the direct approach, contractual liability is based on the reasonable reliance that consensus has been reached, which the one contractant (the contract denier) creates in the mind of the other contractant (the contract enforcer). According to the *Sonap* case, the direct reliance approach entails a threefold enquiry:

1. Was there a misrepresentation regarding one party's intention?

2. Who made this misrepresentation?

3. Was the other party actually misled by the misrepresentation, and if so, woulda reasonable person have been misled?

Application to the facts

In our question, Speedy Motors made a misrepresentation regarding its intention that the offer is made only to professional players, by advertising the reward to the public. Although it may be argued that X was actually misled by the misrepresentation, it is certain that a reasonable person in X's position would not have been misled. X should know, as an experienced amateur golfer, that only certain prizes are open to amateurs. There was therefore no reasonable reliance on consensus on the part of X. X will not succeed in her claim for the prize.

QUESTION 4

Mpho and Craig conclude a contract wherein Mpho agrees to paint Craig's office block by 31 January, and Craig agrees to pay Mpho R10 000: R5 000 at commencement of the contract and R5 000 upon completion of the work. When 40% of the work is done Mpho fails to turn up for work and never completes the work. Did Mpho commit positive malperformance (a form of breach the contract)? Discuss

No he didn't commit positive malperformance but repudiation.

Repudiation: a party to a contract commits the breach of repudiation when, by words or conduct, and without lawful excuse, he or she manifests an unequivocal intention no longer to be bound by the contract or by any obligation forming part of the contract. The intention to repudiate is judged objectively, the test being whether the party accused of repudiation has acted in such a manner as to lead a reasonable person to believe that he or she does not intend to fulfil, or completely fulfil, his or her part of the contract. An intention to terminate the contract is not required, nor is mala fides or fault, though these elements will often be present.

QUESTION 5

Assume the same facts as in question 4. Also, assume that Mpho has committed positive malperformance. Can Craig rescind the contract with Mpho. Discuss

If he committed positive malperformance he may rescind the contract. If there is a cancellation clause (lex commissoria) in the contract entitling the creditor to cancel for the particular type of malperformance that has occurred, he or she may of course do so, even if the breach is not a serious or material one. Where, as is often the case, such a clause requires the creditor to give the debtor notice of intention to rescind should the breach not be rectified within a specified period, the creditor may rescind the contract only if such notice has been given and the debtor remains in default on expiry of the relevant period. In the absence of an applicable cancellation clause, the creditor may cancel the contract only if the malperformance is sufficiently serious. The degree of seriousness that is required can, in the nature of things, be stated only in very general terms.

QUESTION 6

Assume the same facts as in question 4. Also, assume that Mpho has breached the contract and that Craig has validly rescinded the contract. It cost Craig R6 000 to complete the paintwork. Can Craig claim damages from Mpho and if so, what amount? Substantiate your answer.

In terms of the difference rule the extent of the plaintiff's patrimonial or financial loss is determined by comparing the patrimonial position he or she presently occupies after the breach with the hypothetical patrimonial position he or she would have occupied had the contract been properly performed.

The courts often use a more concrete approach in determining the quantum by focusing on the actual element of the patrimony that is affected. According to this approach, damage is calculated by comparing the value that the asset or obligation would have had if the contract had been properly performed, with its actual value after the breach.
Thus, the approach focuses on the specific asset or right and not on the patrimony as a whole.

In practice, the quantification will depend on the nature of the loss that has occurred. For example, the amount of damages may be determined with reference to:

- the market value of the defective goods received as compared with the marketvalue of the goods without the defect;
- the cost of repairing a defective performance or object to make it conform withthe requirements of the contract;
- **the amount of profit that a retailer could have made, but lost due to the breach;**
- the cost of completing an incomplete performance;
- the additional price that must be paid for replacement goods, where

defectivegoods are rejected or where the contract is cancelled; and

- interest paid on an overdraft by the innocent party, where late payment is made.

The financial loss or damage suffered by the plaintiff must have been caused by the breach (causation). The relevant principles to the enquiry into causation were authoritatively set out in *International Shipping Co (Pty) Ltd v Bentley*. The enquiry entails a two-stage process:

3. firstly, one asks whether as a matter of fact the breach causally contributed tothe loss in question; and

4. secondly, if the first question yields a positive answer, one asks whether, as amatter of law, the causal connection between the breach and the loss is sufficiently close that the party in breach should be held responsible for it.

The reason for the distinction between factual and legal causation is that a breach of contract, like a delict, can give rise to a multitude of consequences, some of which might be quite unexpected. As a matter of fairness, the defendant cannot be held liable for all these consequences, no matter how remote they are from the breach. The requirement of legal causation serves the purpose of cutting the causal chain at an appropriate point, and thereby limiting the liability of the defendant.

Factual causation. This is established by means of the 'but-for' test (or conditio sine qua non test). The test enquires whether the loss in question would have been suffered had the breach of contract not been committed. If, but for the breach, the loss would not have been suffered, the breach is a factual cause of the loss; conversely, if the loss would in any event have been suffered, the breach is not a factual cause of the loss.
The innocent party needs to prove, on a balance of probabilities, that the

loss would not have been suffered, but for the breach. If it fails to establish this causal link, that is the end of the enquiry and the damages claim must fail.

Legal causation. The aim is to protect the party in breach from liability that is too wide ranging and unreasonable. The test for legal causation turns on the issue of remoteness
– that is, whether the causal connection that exists between the breach and the loss is sufficiently close to justify the imposition of liability.

The approach to remoteness has traditionally been based on a distinction between general and special damages. In terms of the traditional approach, general damages flowing from the breach of contract are not too remote and hence are recoverable as a matter of course; special damages, on the other hand, are presumed to be too remote unless exceptional circumstances are present. General damages, then, are those that flow naturally and generally from the kind of breach in question. They are the sort of damages that might be expected in the ordinary course of things to result from the breach. As such, they would have been foreseeable to a reasonable person entering into the contract as a probable consequence of the breach in question.

Application to the facts

Yes, Craig can claim damages from Mpho. Craig's position will be determined using the difference approach of the but for test. Also there is legal causation between Mpho's breach and Craig's loss of R6000 in completing the work. Craig can claim the R6000 from Mpho as a general damage flawing naturally from the breach

OCT/NOV 2017

Question 1

Which obligations has NO legal consequences?

1 Civil obligations
2 Natural obligations
3 Facultative obligations
4 Moral obligations
5 Alternative obligations

Question 2

Which of the following is NOT a requirement for a valid contract?

1 Consensus
2 Formalities
3 Reciprocity
4 Possibility
5 Certainty

Question 3

X buys Y's car for R50 000. X pays the purchase price and Y delivers the car to X. Ownership of the car has passed from Y to X because

1 the contract of sale was valid
2 the parties concluded a valid real agreement by Y delivering the car to X and X receiving the car
3 the parties concluded a valid agreement extinguishing a debt by Y delivering the car and X receiving the car
4 the parties acted in good faith when the car was delivered
5 2 and 4

Question 4

Generally, an advertisement is

1 an offer to the public
2 an invitation to do business
3 an offer directed at specified persons
4 an offer directed at unspecified persons
5 1 and 4

Question 5

Generally, an offer of reward is

1 an offer to the public
2 an invitation to do business
3 an offer directed at specified persons

4 an offer directed to unspecified persons
5 1 and 4

Question 6

Generally, where is the place of formation of a contract?

1 where the offeree decides to accept the offer
2 where the last act necessary to constitute the agreement is formed
3 where the offeree posts his acceptance
4 where the offeree prepares to perform in terms of the contract
5 where the offeror learns of the acceptance

Question 7

Which theory explains the legal rules that determine when and where a contract is concluded by telephone?

1 the declaration theory
2 the information theory
3 the reliance theory
4 the reception theory
5 the expedition theory

Question 8

X wants to conclude a lucrative contract with company Y. To ensure that he is successful, X agrees with the agent of Y, who is responsible for concluding contracts on behalf of Y, that for a fee of R50 000 the agent will ensure that the contract will be awarded to X. After the contract has been concluded between X and Y, and both parties have performed, the financial director of Y discovers how X secured the contract. The issue emanating from these facts relates to

1 duress
2 undue influence
3 commercial bribery
4 misrepresentation
5 mere commercial competition

Question 9

Assume the same facts in question 8. Which statement(s) is/are correct?

1 the contract between X and the agent is illegal and void
2 the agent will be able to claim payment of R50 000 from X
3 the contract between X and Y is voidable at the instance of y
4 the contact between X and Y is voidable at the instance of both X and Y
5 Options 1 and 3

Question 10

Which cause(s) of action may render the contract voidable?

1 A *dictum et promissum*
2 Illegality
3 Supervening impossibility of performance
4 **Innocent misrepresentation**
5 A reasonable and material mistake

Question 11

Inequality of bargaining power between the parties is taken into account as such to determine if

1 **a contract is against public policy**
2 undue influence has taken place
3 duress has taken place
4 options 1 and 2
5 options 1, 2 and 3

Question 12

What type of claim may the aggrieved party successfully institute against the other contracting party for the return of his performance in terms of an illegal contract, if the *in pan delicto* rule is relaxed?

1 A delictual claim
2 **An unjustified enrichment claim**
3 A contractual claim
4 A specific performance claim
5 None of the above

Question 13

Cedric has joined a religious sect. Recently this sect took advantage of Cedric's good nature and convinced him to donate his motor vehicle to the sect, which Cedric did. Cedric approached you for legal advice, explaining that he wants his motor vehicle returned to him. The issue emanating from the facts relates to

1 duress
2 **undue influence**
3 commercial bribery
4 puffs
5 *dicta et promissa*

Question 14

Assume the same facts as in question 13. An order sort for the return of the motor vehicle by Cedric amounts to an order for

1 **restitution**
2 specific performance
3 compensation for general damages
4 compensation for special damages
5 rectification

Question 15

Which of the following must a party prove who seeks to set a contract aside on the ground of undue influence

1 the other party obtained influence over her
2 the other party exercised this influence over her, in an unscrupulous manner in order to induce her to consent to a transaction which is to her detriment and which she, with normal free will, would not have concluded
3 the other party gained his influence over her by standing in close relationship to her
4 **options 1 and 2**
5 options 1, 2 and 3

Question 16

What theory regards the inner wills of the parties as irrelevant on the basis that what the parties say and do are important and not what the parties think?

1 **the declaration theory**
2 the will theory
3 the reliance theory
4 the reception theory
5 the expedition theory

Question 17

An option is

1 only an offer to sell something
2 both an offer to sell something, and an agreement to keep this offer open
3 **both an offer to sell something, and an agreement to keep this offer open for a certain period**
4 an agreement to make an offer revocable for a certain period of time
5 none of the above

Question 18

ABC Limited donates money to the XYZ Municipality. The grant is subject to the proviso that the money be used to build a clinic for the local community. The donation is subject to

1 a resolutive condition
2 a suspensive condition
3 a modal clause (*modus*)
4 a counter performance
5 either 3 or 4

Question 19

In ticket cases, to determine if the person receiving the ticket is bound by the terms, which of the following is consistent with the tree-fold test applied by the courts?

1 did the person receiving the ticket know that there was writing on the ticket?
2 Did the person receiving the ticket sign and acknowledge receiving the ticket?
3 Did the person issuing the ticket take the steps that he believed were necessary to bring the terms to the notice of the other party
4 1, 2 and 3
5 1 and 3

Question 20

X undertakes to donate R100 000 to Y as soon as Y-s husband dies. This donation is subject to

1 suspensive condition
2 resolutive condition
3 modal clause (*modus*)
4 suspensive time clause
5 resolutive time clause

Question 21

X promises to give Y R10 000 if Y successfully climbs Everest. This is an obligation subject to

1 suspensive time clause
2 resolutive time clause
3 suspensive condition
4 resolutive condition
5 modal clause (*modus*)

Question 22

Y sells her car to Z for R20 000 on 15 January. Y undertakes to deliver the car to Z on 17 January. On 16 January, Y informs Z that she is not going to deliver the car at all, because she is no longer interested in selling the car. This act amounts to

1 *mora debitoris*
2 *mora creditoris*
3 repudiation
4 prevention of performance
5 none of the above options

Question 23

Y sells his car to Z for R20 000 on 15 January. Y undertakes to deliver the car to Z on 17 January. Y destroys the car in a fit of anger on 16 January. This act of Y amounts to

1 prevention of performance
2 impossibility of performance
3 supervening impossibility of performance
4 *mora debitoris*
5 positive malperformance

Question 24

Ben and John conclude a contract. In terms of the contract, the parties have agree that John will purchase Ben's Harley Davidson motorcycle for R200 000. However, after the contract is concluded, John is unable to raise the finance from his bank to purchase the motorcycle. John wishes to get out of the sale. **Do not apply the Consumer Protection ct of 2008 to this problem.** Which answer reflects the CORRECT legal position?

1 No valid contract arose because the obligation to pay the price was practically or economically impossible during conclusion of the contract
2 No valid contract arose because the obligation to pay the price was objectively impossible during the conclusion of the contract
3 The obligation to pay the price is extinguished by supervening impossibility of performance because the performance has become objectively impossible
4 The obligation to pay the price is not extinguished by supervening impossibility of performance because the performance has only become subjectively impossible
5 The obligation to pay the price is extinguished by supervening impossibility of performance because of John's fault (his inability to raise finance)

Question 25

X orders medication from a pharmacy but the pharmacy indicates that it only has the generic version of the medicine that X requires in stock. X indicates that he will accept the generic medicine in the place of the prescribed medicine. This is an example of

1 novation
2 *datio in solutum*
3 **compromise**
4 release
5 none of the above

Section B

Question 1

State the requirements for a valid offer and acceptance

1.1 The offer must be firm ***(1)***

Hutchison & Pretorius (eds) *The Law of Contract in South Africa* 2nd ed (2012) 48:

The offer must be a firm one, made ***animo contrahendi*** – that is to say, with the intention that its acceptance will call into being a binding contract. This requirement is not fulfilled if one of the parties makes a tentative statement to the other with the intention of sounding the other out in order to find out whether he or she would be prepared to enter into negotiations (*Efroiken v Simon* 1921 CPD 367). Whether a particular declaration amounts to a firm offer, or is merely a tentative indication of willingness to do business, may not always be easy to determine. It is ultimately a question of fact to be decided in the light of all the relevant circumstances (*Pitout v North Cape Livestock Co-operative Ltd* 1977 (4) SA 842 (A).

1.2 The offer must be complete ***(1)***

The offer must contain all the material terms of the proposed agreement – there cannot be further matters that still have to be negotiated before the overall agreement can take effect (*OK Bazaars v Bloch* 1929 WLD 37; *Lambons (Edms) Bpk v BMW (Suid Afrika) (Edms) Bpk* 1997 (4) SA 141 (SCA)). Often, when large contracts are negotiated, various issues have to be settled before the deal can go ahead. In such a case, it is said that 'nothing is agreed until everything is agreed'. In other words, the fact that the

parties have reached agreement on issues A, B and C cannot give rise to binding obligations, if issues D and E still have to be discussed, and the

intention of the parties is that there will be no binding contract until a comprehensive agreement is reached. However, if the intention of the parties is that the preliminary agreement in respect of issues A, B and C should be binding on them, irrespective of whether they ever reach consensus on outstanding issues D and E, then of course the preliminary agreement will indeed constitute a binding contract. If agreement is subsequently reached on issues D and E, the preliminary agreement will be incorporated into and superseded by the more comprehensive agreement (*CGEE Alsthom Equipments et Enterprises Electriques, South African Division v GKN Sankey (Pty) Ltd* 1987 (1) SA 81 (A);*Belmore v Minister of Finance* 1948 (2) SA 852 (SR)).

1.3 The offer must be clear and certain

The offer must be sufficiently certain; it should be enough for the addressee merely to answer 'Yes', for a contract to come into being. If the offer is so vague that it fails to provide a reasonably clear indication of what the offeror has in mind, no acceptance of the offer can create a binding obligation, because it will be impossible to determine the content of that obligation. For example, if Christine says to Sepho: 'I will buy your car if it suits me', then Sepho cannot accept the offer, because it is too vague (*Kantor v Kantor* 1962 (3) SA 207 (T)). In this case, the agreement would be regarded as void for vagueness.

Question 2

Discuss the objective approach of the courts to error as qualified by the *iustus error* doctrine

The **declaration theory** or wholly **objective approach** to contractual liability grounds contractual liability purely on concurring, objective declarations. The actual intention of a party is irrelevant. The theory's

suggestion that a contract that neither party intended, may be imposed on them, merely because their declarations indicate concurring intentions from an objective viewpoint. *Prins v Absa Bank Ltd*: the surety believed that he was signing a deed of suretyship of limited duration and amount whereas the bank claimed that it was for an unlimited period. Aware of the surety's misapprehension when signing the document the bank official who supervised the signing of the deed of suretyship did not correct it. It was held that it was unreasonable for the bank to rely on the unlimited suretyship.

Question 3

Distinguish between suspensive conditions, resolutive conditions, suspensive time clauses, and resolutive time clauses.

SUSPENSIVE CONDITION:

Performance of an obligation (which is an uncertain future event which may or may not occur) is suspended, and enforceable only when that event has been fulfilled or has failed.

RESOLUTIVE CONDITION:

Performance of obligations should operate in full, but will come to an end if an uncertain future event does or does not happen.

SUSPENSIVE TIME CLAUSE:

Performance of obligations postponed/suspended until an event or time that is certain to arrive in the future.

RESOLUTIVE TIME CLAUSE:

Obligations terminate at a certain date or happening of a certain future event.

Question 4

Discuss *mora debitoris* and *mora creditoris* and distinguish between them. [10]

MORA DEBITORIS:

Mora debitoris is the unjustifiable failure of a debtor to make timeous performance of a positive obligation that is due and enforceable and still capable of performance in spite of such failure.

Requirements:

- The debt must be due and enforceable.
- The time for performance must have been fixed, either in the contract or by a subsequent demand for performance, and the debtor must have failed to perform timeously.
- Such failure to perform on time must be without legal justification.

Mora ex re occurs where the debtor fails to perform on or before the due date expressly or impliedly stipulated by the parties in their contract.
Mora ex persona occurs where no time for performance has been stipulated, and the creditor demands that the debtor perform on or before a definite date that is reasonable in the circumstances (by means of a letter of demand, or oral demand).

MORA CREDITORIS:

Mora creditoris is a form of breach of contract by a creditor. It occurs in cases where a creditor is obliged to lend his or her cooperation, and culpably fails to do so timeously.

Requirements:

- The debtor must be under an obligation to make the performance to the creditor (the performance need not beenforceable or due, however).
- Cooperation of the creditor must be necessary for the performance by the debtor of his obligation.
- The debtor must tender performance to the creditor.
- The creditor must delay in accepting performance.
- The delay must be due to the fault of the creditor.

QUESTION 5

On 1 June M and Q conclude a contract whereby M undertakes to manufacture and install kitchen cupboards in Q's home for R50 000. The parties agree that the price will be paid as soon as the kitchen cupboards are installed, but they do not determine a date for the completion of the work. M, however, informs Q during the negotiations that she has some other work to complete and that she will attend to the kitchen cupboards as soon as possible. Eight months has lapsed since the contract was concluded and Q has not heard from M. Q runs out of patience and hires W to manufacture and install the same kitchen cupboards for R60 000. After W has completed the job, M turns up to do the work. Q claims R10 000 damages from M, but M institutes a counterclaim for R30 000 from Q for her loss of profit. Who will succeed in this claim? Discuss.

This question deals with damages for breach of contract. In order to determine who will succeed in the claim for damages, we must ascertain which party committed the breach.

A plaintiff who wishes to claim damages for breach of contract must prove the following:

1. A breach of contract has been committed by the defendant
2. The plaintiff has suffered financial or patrimonial loss
3. There is a factual causal link between the breach and the loss
4. As a matter of legal causation, the loss is not too remote a consequence of the breach.

Did M or Q breach the contract?

M could possibly be in breach in the form of *mora debitoris*. *Mora debitoris* is the unjustifiable failure of a debtor to make timeous performance of a positive obligation that is due and enforceable, and still capable of performance in spite of such failure.

Because performance has become impossible, it is not capable of performance. Also, no date was stipulated for performance, nor did Q demand performance, so M could neither be in *mora ex re* nor *mora ex persona* respectively. M has not committed a breach of contract.

Q, by hiring W to manufacture the cupboards has committed two forms of breach: repudiation, and prevention of performance. A party commits the breach of repudiation when, by words or conduct, and without lawful excuse, he manifests an unequivocal intention no longer to be bound by the contract or any obligation forming a part thereof.
Prevention of performance is a breach whereby, after conclusion of the contract, one of the parties, owing to their fault, causes performance to become impossible.

M will therefore be able to claim damages from Q successfully, because he will be able to prove that Q committed a breach of contract. The aim of damages is to place the innocent party in their fulfilment position, that is, the position they would have been in had there been no breach. M's claim for loss of profit will probably be successful.

2022 ASSIGNMENTS

QUESTIONS

1. Y and Z reach an agreement that should Y sell his leather couch , he (Y) will offer to sell it to Z first, before making an offer to sell the couch to any other person. Which statement is correct?

a. Y and Z concluded an option contract
b. Y and Z concluded a pre-emption contract
c. Y and Z concluded neither an option contract nor a pre-emption contract
d. Y and Z concluded an option contract and a pre-emption contract
e. Y and Z concluded a contract subject to a resolutive condition

2. Jack is engaged to Jill, Jack has a very strong personality and eventually persuades Jill to sell and transfer her (Jill's) house that is worth R900 000 to him (Jack) at a purchase price of a mere R50 000.After registration of the property in Jack's name, he breaks of the engagement. Which option below has the **LEAST** amount of relevance, in relation to the cause of action that Jill is likely to rely on in her pursuit to have the transfer of the house into Jack's name set aside.

a. Proof that there was an erosion of Jill's ability to exercise a free and independent judgment at the time of contracting with Jack.
b. Proof that Jack used his superior position to undermine the will of Jill.
c. Proof that Jack and Jill were in a close relationship at the time of concluding their sale agreement
d. Proof that Jack applied improper pressure on Jill which amounted to intimidation.
e. Proof that Jill was improperly induced to conclude the contract with Jack

3. X points a loaded gun at Y, ad orders him (Y) to sign a written contractual document which X already signed. X explains that the document is for the sale of Y's car to him (X), at a price of R30 000. The market value of the car is R250 000. Y, fearing for his life, signs the document. If Y proves the requirements for the relevant cause of action that he (Y) is most likely to pursue, then the contract between X and Y becomes

a. Voidable at the instance of Y.
b. Neither void nor voidable,but it remains unenforceable
c. Voidable at the instance of both X and Y
d. Automatically void and voidable
e. Void at the instance of X

4. X finds himself stranded in a remote area when his motor vehicle breaks down. There is no cell phone reception in the area. After five days have passed without seeing anyone. Y comes along and offers to tow X to the nearest town for the exorbitant fee of R20 000. X initially turns the offer down, but is wife, Z, makes such a scene that he relents and accepts Y's offer. X refuses to pay Y R20 000 after being towed to the town. A reasonable fee would have been R5 000, but Y claims the full amount of R20 000 from X. Regarding the factual scenario, which statement is **CORRECT?**

a. There was no consensus between X and Y too conclude a contract for R 20 000.
b. **This is a case dealing with an unconscionable exploitation of an emergency situation**
c. Based on Y's conduct, this is a case of commercial bribery
d. Y fraudulently misrepresented his exorbitant fee charge of R20 000.
e. This factual scenario deals with *pacta de contrahendo.*

5. Where a contract stipulates that each co-debtor is liable for the full amount of the debt, and the creditor can accordingly claim the full amount of the debt, or any lesser amount, from any one co-debtor or more than one co-debtor, this constitutes

a. Simple joint liability
b. Stipulation alteri
c.* Liability in *solidum
d. Collective joint liability
e. A delict

6. A contract of sale was concluded wherein X sold a Rolex watch to Y and Z. The parties are likely to intend this to be a case of

a. Divisible performance
b. Indivisible performance
c. Divisible and indivisible performance
d. Neither divisible, nor indivisible performance
e. A restraint of trade agreement

7. X rents a house from Y for R10 000 per month , until such time as his employer transfers him to commence working in the company's Cape Town offices. The house is located in Johannesburg. The lease is subject to a

a. Suspensive condition
b. Resolutive condition
c. Suspensive time clause
d. Resolutive time clause
e. Modus

8. Which theory grounds contractual liability by adopting a subjective approach, based solely on consensus?

a. The expedition theory
b. The reliance theory
c. The declaration theory
d. The reception theory
e. The will theory

9. John agrees with Michael, that Michael will paint John's holiday home at the coast in Durban, for R30 000. Unbeknown to both of them, the house had been destroyed in a storm the previous day. This is a case of

a. Mutual mistake
b. Supervening impossibility of performance
c. Impossibility of performance (also referred to as initial impossibility of performance)
d. An obligation subject to a resolutive condition
e. An obligation subject to a suspensive condition

10. X and Y conclude a contract, in terms of which X rents a house from Y for a period of six months, commencing from today. The contract is subject to

a. Suspensive condition
b. Resolutive condition
c. Suspensive time clause
d. Resolutive time clause
e. Modus

PVL3702 Assignment 1 Question

On 5 August, X sends a written offer by post to Y, to purchase Y's ROLEX watch for R10000. One of the terms in the offer is that the offer will lapse on 20 August. The offer also stipulates that X must be aware of the acceptance, for any legal obligations to arise. Y writes the letter of acceptance on 9 August in response to X's offer, and Y posts this written acceptance on 10 August. X's son collects the post from the Post Office on 17 August, and amongst the sealed letters of post collected, is Y's acceptance. X's son is not responsible and only hands all the sealed post to X, on 20 August. On 21 August, X opens the post and reads the letter of acceptance. Was a legally binding contract concluded between X and Y? Discuss and substantiate fully.

As part of your research for this question you were required to read *Cape Explosive Works Ltd v South African Oil and Fat Industries; Cape Explosive Works Ltd v Lever Brothers (South Africa) Ltd* 1921 CPD 244, and *A to Z Bazaars (Pty) Ltd v Minister of Agriculture* 1975 (3) SA 468 (A). You were also required to identify the relevant section(s) in the prescribed textbook, relating to this question.

PVL3702 Assignment 1 Answer

Preliminary steps relating to basic research:

In order to identify the law, which you should apply to the problem, you were asked to:

(1) read two cases; and

(2) identify the relevant section(s) in the prescribed textbook.

(1) Read two cases

In *Cape Explosive Works Ltd v South African Oil and Fat Industries; Cape Explosive Works Ltd v Lever Brothers (South Africa) Ltd*,[1] the expedition theory was introduced into South African law. In terms of this theory, if certain requirements are met, a contract is concluded where and when the letter of acceptance was posted by an offeree. In this case, two offers were made from different companies, to the offeree. The offeree was based in the Cape where it received the offers. The offerors sent their offers by letter through post from Gauteng and Durban, where they were based respectively. In response to both offers, the offeree sent letters of acceptance which were posted at Somerset West in the Cape, and addressed to the offerors. These acceptance letters were then subsequently received and read in Gauteng and Durban respectively, by the respective offerors. The court had to address the issue of where and when the contracts were concluded. The offerors argued that each contract was concluded in the relevant province where and when the offerors received and read the offerees acceptance. The court disagreed and held that the contracts were concluded at Somerset West, where the letters of acceptance were posted.

It emerges from *A to Z Bazaars (Pty) Ltd v Minister of Agriculture*,[2] that the expedition theory will not apply where the offeror has expressed a contrary intention, either expressly or tacitly.

(2) Identify the relevant section(s) in the textbook

If the "Table of Cases" is consulted towards the end of the prescribed textbook,[3] you will find the pages where the *Cape Explosive*, and *A to Z Bazaars* cases are discussed in the textbook. Only those relevant pages which are prescribed for you to study are referred to below.

[1] 1921 CPD 244. Hereinafter referred to as "*Cape Explosive*".
[2] 1975 (3) SA 468 (A). Hereinafter referred to as *A to Z Bazaars*.
[3] Dale Hutchison and Chris Pretorius (eds), *The Law of Contract in South Africa* (Oxford 2017).

The relevant page on which *Cape Explosive* appears in the text, is on page 60. The page mainly deals with postal contracts relating to the expedition theory. Accordingly, it explains the framework of how a contract may be concluded by post, and thereafter there is a discussion of this case and the court's ruling. In this case the expedition theory was successfully applied and the court held that the contract was concluded when and where the letter of acceptance was posted. **This does not automatically mean that the expedition theory will apply to the facts in the assignment question. Whether or not the expedition theory applies, will be based on the application of the law to the facts presented.**

A to Z Bazaars appears in footnote 66 on page 61 as authority for the requirement that, for the expedition theory to apply, the offeror must not have indicated a contrary intention, expressly or tacitly. The expedition theory will therefore for example not apply if the offeror prescribes a different mode of acceptance to be complied with by the offeree, for the contract to be concluded.

Regarding the above cases, the relevant sections of the textbook are pages 60-61 where the application of the expedition theory relating to postal contracts is discussed. The requirements to be met for the expedition theory to apply, are also set out. When this theory applies, it impacts on determining whether a contract has been concluded, and if so, where and when the contract has been concluded (or put another way, where and when the acceptance took effect). Considering that where and when an acceptance takes effect is applicable to this discussion, means that pages 58-59 of the prescribed textbook are also relevant to the facts in the assignment question.

Having set out above what you should have gained from your research, the answer to the assignment question is set out herein below:

Identifying the problem

The question relates to the legal rules pertaining to when and where an acceptance takes effect.[4] More specifically, it has to be considered whether Y's acceptance was legally effective, based on the facts presented. Importantly to decide this issue, one has to determine whether the expedition theory was applicable to the scenario presented in the assignment question.

Discussing the relevant law applicable to the problem *AND* applying the law to the facts of the problem

The question deals with when and where an acceptance takes effect. The general rule to determine such an issue is the information theory. In accordance with this theory, the offeror must learn of the offeree's acceptance for the acceptance to have legal effect. And where a time limit has been prescribed for the acceptance to take effect, the offer automatically lapses if it has not been accepted within the prescribed time period.[5]

The information theory is the general rule, however there are exceptions to the general rule which may apply. One such exception which may apply (depending on the facts presented) relates to postal contracts, provided that all the requirements for this exception can be proved. From the facts given, the offer was made by post and so too was the acceptance. The postal services appear to be operating normally as both parties appear to be receiving their post. And the contract is of a commercial nature which relates to the sale of a watch. Whilst these requirements are met, there is one requirement that is problematic for Y to successfully argue that the expedition

[4] Dale Hutchison and Chris Pretorius (eds), *The Law of Contract in South Africa* (Oxford 2017) 58-61.
[5] Dale Hutchison and Chris Pretorius (eds), *The Law of Contract in South Africa* (Oxford 2017) 56.

theory should apply. **This requirement is that the offeror (X) must not have indicated a contrary intention, expressly or tacitly**.[6] This means that if the offeror (X) intended or indicated either expressly or tacitly that the contract will not be concluded by post, then the expedition theory will not apply under such circumstances to determine when and where the acceptance takes legal effect. In the scenario presented, X did indicate a contrary indication as the offer stipulated that X must be aware of the acceptance for any legal obligations to arise. Therefore, the expedition theory does not apply to this question because X only became aware of the acceptance several days after Y posted the acceptance. The fact that X must be aware of the acceptance for the acceptance to take legal effect, is consistent with the information theory. And because the expedition theory as an exception does not apply, the general rule which is the information theory has to be applied to the set of facts presented. When this application is done the outcome is that a valid contract was not concluded between X and Y because the offer already lapsed when X became aware of the acceptance on 21 August.

The giving of appropriate advice

Y's acceptance was not legally effective, because X did not become aware of it timeously. Therefore, a valid contract of sale was not concluded between X and Y. **Total: [20]**

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[6] Dale Hutchison and Chris Pretorius (eds), *The Law of Contract in South Africa* (Oxford 2017) 61.

PVL3702 Assignment 1 Question and Answer: 2022 Semester 2

Question

On 5 August, X sends a written offer by post to Y, to purchase Y's **ROLEX** watch for R20 000 (twenty thousand rand). One of the terms in the offer is that the offer will lapse on 20 August. In response to this offer, Y writes her letter of acceptance and posts it to X on 15 August. On 17 August Y changes her mind and decides that she no longer wants to sell the **ROLEX** watch as it is a limited edition. Y then calls X by telephone on 18 August and informs X that she (Y) is withdrawing her acceptance and that her postal acceptance should be ignored. On 21 August X receives Y's written acceptance that was sent by post. X seeks your advice on whether a legally binding contract was concluded between X and Y. Discuss and substantiate fully.

As part of your research for this question you were required to read *Cape Explosive Works Ltd v South African Oil and Fat Industries; Cape Explosive Works Ltd v Lever Brothers (South Africa) Ltd* 1921 CPD 244, and *A to Z Bazaars (Pty) Ltd v Minister of Agriculture* 1975 (3) SA 468 (A). You were also required to identify the relevant section(s) in the prescribed textbook, relating to this question.

PVL3702 Assignment 1 Answer

Preliminary steps relating to basic research:

In order to identify the law, which you should apply to the problem, you were asked to:

(1) read two cases; and

(2) identify the relevant section(s) in the prescribed textbook.

(1) Read two cases

In *Cape Explosive Works Ltd v South African Oil and Fat Industries; Cape Explosive Works Ltd v Lever Brothers (South Africa) Ltd*,[1] the expedition theory was introduced into South African law. In terms of this theory, if certain requirements are met, a contract is concluded where and when the letter of acceptance was posted by an offeree. In this case, two offers were made from different companies, to the offeree. The offeree was based in the Cape where it received the offers. The offerors sent their offers by letter through post from Gauteng and Durban, where they were based respectively. In response to both offers, the offeree sent letters of acceptance which were posted at Somerset West in the Cape, and addressed to the offerors. These acceptance letters were then subsequently received and read in Gauteng and Durban respectively, by the respective offerors. The court had to address the issue of where and when the contracts were concluded. The offerors argued that each contract was concluded in the relevant province where and when the offerors received and read the offerees acceptance. The court disagreed and held that the contracts were concluded at Somerset West, where the letters of acceptance were posted.

It emerges from *A to Z Bazaars (Pty) Ltd v Minister of Agriculture*,[2] that the expedition theory will not apply where the offeror has expressed a contrary intention, either expressly or tacitly. Furthermore, in this case the court had to decide whether a contract was concluded by post. Unique to this case was that **a statutory provision required that the acceptance be delivered to the offeror**, so for the acceptance to take effect the offeror had to receive the offeree's written acceptance, or the written acceptance had to reach the offeror's physical address, for **delivery** to have taken effect. Even though the offeror indicated a postal address for the offeree to reply to the offer, the statute required **delivery** of the acceptance, therefore the mere posting of the acceptance did not result in the conclusion of a legally binding contract. Accordingly, the court held that a contract was not concluded by post in this case.

[1] 1921 CPD 244. Hereinafter referred to as "*Cape Explosive*".
[2] 1975 (3) SA 468 (A). Hereinafter referred to as *A to Z Bazaars*.

(2) Identify the relevant section(s) in the textbook

If the "Table of Cases" is consulted towards the end of the prescribed textbook,[3] you will find the pages where the *Cape Explosive*, and *A to Z Bazaars* cases are discussed in the textbook.

The relevant pages on which *Cape Explosive* appears in the text, is on pages 60, 61 and 62. The application and criticisms of the expedition theory are explained on these pages.

A to Z Bazaars appears in footnote 66 on page 61, as well as on page 62 of the textbook. It appears from these pages relating to this case, that for the expedition theory to apply, the offeror must not have indicated a contrary intention, expressly or tacitly. **And the court in this case also questioned whether the application of the expedition theory as applied in *Cape Explosive* necessarily precluded the offeree from withdrawing the postal acceptance before such acceptance was received by the offeror.** This aspect is relevant to consider for this assignment question.

Regarding the above cases, the relevant sections of the textbook are pages 60, 61 and 62 where the application and criticisms of the expedition theory relating to postal contracts is discussed. The requirements to be met for the expedition theory to apply, are also set out. When this theory applies, it impacts on determining whether a contract has been concluded, and if so, where and when the contract has been concluded (or put another way, where and when the acceptance took effect). Considering that where and when an acceptance takes effect is applicable to this discussion, means that pages 58-59 of the prescribed textbook are also relevant to consider for this assignment question.

[3] Dale Hutchison and Chris Pretorius (eds), *The Law of Contract in South Africa* (Oxford 2017).

Having set out above what you should have gained from your research, the answer to the assignment question is set out herein below:

Identifying the problem

The question relates to the legal rules pertaining to when and where an acceptance takes effect.[4] More specifically, **firstly** it has to be determined whether Y's acceptance **by post** was legally effective, based on the facts presented. Importantly to decide this issue, one has to determine whether the expedition theory was applicable to the scenario presented in the assignment question. **Secondly**, if the expedition theory does apply to the facts, the impact of Y's withdrawal of her acceptance has to also be considered.

Discussing the relevant law applicable to the problem *AND* applying the law to the facts of the problem

The question deals with when and where an acceptance takes effect. The general rule to determine such an issue is the information theory. In accordance with this theory, the offeror must learn of the offeree's acceptance for the acceptance to have legal effect. And where a time limit has been prescribed for the acceptance to take effect, the offer automatically lapses if it has not been accepted within the prescribed time period.[5]

The information theory is the general rule, however there are exceptions to the general rule which may apply. One such exception which may apply (depending on the facts presented) relates to postal contracts, provided that all the requirements for this exception can be proved. From the facts given, the offer was made by post and so too was the acceptance. The postal services appear to be operating normally as both parties appear to be receiving their post. And the offeror (X) has not indicated a contrary intention, which means that acceptance could be done by post. Lastly, the contract is of a commercial nature which relates to the sale of a watch. **It follows that all**

[4] Dale Hutchison and Chris Pretorius (eds), *The Law of Contract in South Africa* (Oxford 2017) 58-61.
[5] Dale Hutchison and Chris Pretorius (eds), *The Law of Contract in South Africa* (Oxford 2017) 56.

the requirements are complied with for the expedition theory to apply. This means that a legally binding contract was concluded on 15 August when Y posted her written acceptance. Note that this acceptance was timeous as it occurred before the offer could lapse on 20 August.

The matter does not end here, as it still has to be considered whether Y's withdrawal of the acceptance on 18 August has any legal effect. **In *A to Z Bazaars (Pty) Ltd v Minister of Agriculture*,[6] the court also questioned whether the expedition theory as applied in *Cape Explosive Works Ltd v South African Oil and Fat Industries; Cape Explosive Works Ltd v Lever Brothers (South Africa) Ltd*,[7] necessarily precluded the offeree from withdrawing the postal acceptance before such acceptance was received by the offeror.** The court did not make a ruling on this issue because it was not necessary to do so, as the applicable statute required the acceptance to be delivered, which meant that acceptance had to reach the offeror or the offeror's physical address. Accordingly, the court held that a contract was not concluded by post in this case.

Because the court in *A to Z Bazaars* did not make a ruling on whether the timeous revocation of a postal acceptance was legally effective, the application of the expedition theory as applied in *Cape Explosive* still remains a binding precedent.[8] Applying this theory to the facts means that a contract was concluded on 15 August, and Y's withdrawal of the acceptance does not affect the validity of the contract which was already legally binding. It also does not matter that the postal acceptance only reached X on 21 August which was after the date the offer lapsed (20 August), as the expedition theory applied to the facts, and not the information theory.

The giving of appropriate advice

A valid contract of sale was concluded between X and Y. **TOTAL [20]**

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[6] 1975 (3) SA 468 (A) 476. Hereinafter referred to as *A to Z Bazaars*.
[7] 1921 CPD 244. Hereinafter referred to as "*Cape Explosive*".
[8] Dale Hutchison and Chris Pretorius (eds), *The Law of Contract in South Africa* (Oxford 2017) 62.

Regards,

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2021

ASSIGNMENTS

1.1 Assignment 01

Question

- **For the first assignment, you are required to read two cases (which are referred to in the next paragraph). These cases may not provide the complete answer, and you must study all the relevant prescribed sections of the prescribed textbook to fully answer the assignment question.** Note that finding and reading the cases is part of showing that you are able to conduct basic research, before you proceed to answer the question. When you read a case as part of your researching exercise, you must identify whether a case is relevant to the facts in the problem-type question, and if so, to what extent. As part of this exercise, you must also consider if a case is not relevant, and if the facts therein are distinguishable to the facts in the question that you are dealing with.

- **The two cases that you must read for the first assignment are *Kok v Osborne* 1993 (4) SA 788 (SE), and *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 (4) SA 164 (D).** You can find these judgments in conventional law libraries, online at the website of the Southern African Legal Information Institute (SAFLII) (www.saflii.org) or as an e-resource on the Unisa Library site. On the Unisa Library site click on “Find e-resources”. Then click on “Subjects” and after that, scroll down the page and click on “Law”. Scroll down to and click on “Jutastat e-Publications (Juta Law Online)” or “LexisNexis (South African Law)”, to find the South African cases that you are looking for.

- **Importantly, once you find and read the two cases mentioned in the previous paragraph,** use these two cases to identify the relevant section(s) in the prescribed textbook to answer the assignment question. Study the relevant section(s) of the textbook. **Use these two cases that you read, and the relevant prescribed sections of the prescribed textbook to fully answer** the question below.

X is one of ten people interviewed for a job which requires specialist skills and expertise, at company Y. All ten candidates were very keen to be employed at company Y, and at their job interviews for this position, they all signed a document titled "Offer of Employment", which included the terms of employment proposed. Subsequently, X received a "Letter of Acceptance"signed by the relevant authorised representative of company Y, informing her (X) that she is the successful candidate, and congratulating her on her appointment. X was also informed in this acceptance letter, that all the terms included in the "Offer of Employment" document which X signed, will apply to her employment with company Y. Based on this letter of acceptance, X then resigned from her employment in Durban, in order to take up her new position at company Y, in Johannesburg. She also then sold her house in Durban and made arrangements to have her furniture moved to her new home in Johannesburg. However, to her surprise, X thereafter received an apology letter from company Y, stating that the letter of acceptance was sent to her by mistake, and that it was intended to be sent to another person who was interviewed by the selection committee, as that person had the necessary skills and expertise required for the position. Company Y is of the view that because it made an administrative error and mistakenly sent the acceptance letter to X, a legally binding contract was not concluded between the parties. **Advise X fully, whether an enforceable contract was concluded between her (X) and company Y. Apply the indirect approach of the courts and refer to relevant case law in your answer. Do not apply the Consumer Protection Act 68 of 2008 to this question. And also do not apply any Labour Law principles to this question.**

TOTAL ASSIGNMENT 01 [10]

Preliminary steps relating to basic research:

In order to identify the law, which you should apply to the question, you were asked to:

(1) read two court judgments; and

(2) identify the relevant section(s) in the prescribed textbook.

(1) Read two cases

In *Allen v Sixteen Stirling Investments (Pty) Ltd*,[1] the plaintiff believed that he was purchasing the erf shown to him by the seller's agent, while the written contract that he signed indicated the correct erf which was a completely different property. His mistake related to performance and was material. This case also dealt with an *error in corpore* which is a material mistake. Based on the facts, the court also found that the plaintiff's mistake was also reasonable. Accordingly, the court upheld the *iustus error* doctrine in favour of the plaintiff and held that the contract was void.

In *Kok v Osborne*,[2] the defendant believed that he was contracting with the plaintiff and another party jointly, but the reality was that he was only entering into a contract with the plaintiff alone. This *error in persona* meant that the defendant was mistaken as to the party or parties with whom he was contracting. The court held that such a mistake was material. Based on the facts, the court found that the conduct of the defendant was reasonable. Accordingly, the court found

[1] 1974 (4) SA 164 (D). Hereinafter referred to as "*Allen*".

[2] 1993 (4) SA 788 (SE). Hereinafter referred to as "*Osborne*".

that the defendant's mistake amounted to a *iustus error*, which therefore rendered the contract void.

The above two cases give the reader an indication that the assignment question to be answered could be related to the *iustus error* doctrine.

(2) Identify the relevant section(s) in the textbook

If the "Table of Cases" is consulted in the prescribed textbook[3] you will find the relevant pages where the *Allen* and *Osborne* cases are discussed in the content and footnotes in the textbook. When you look at these content and footnote references, you will notice that these cases impact on issues relating to whether a mistake is material and reasonable. Accordingly, these aspects pertain to the *iustus error* doctrine.

In summary, based on the above **preliminary research** you should have worked out that the *iustus error* doctrine is relevant for the assignment question. This is consistent with the instruction in the question to apply the indirect approach of the courts. The *iustus error* doctrine is used as an indirect application of the reliance theory.[4] It follows that this doctrine will be applied to the assignment question.

What follows below is the answer to the assignment question.

Answer

Identifying the problem

The facts seemingly indicate that X and company Y may not have reached actual consensus based on the will theory because company Y sent the acceptance letter to the wrong person. Company Y sent the letter of acceptance to X by mistake as it intended to contract with another party. The question thus deals with error, and the application of the *iustus error* doctrine. The *iustus error* doctrine has two requirements: the mistake must be material (an application of the will theory) and reasonable (an indirect application of the reliance theory). Because Company Y as the contract denier believes that a valid contract was not concluded, it must prove both of these requirements for the agreement to be declared null and void. If it fails to do so, then the contract will be valid and legally binding.

Discussing the relevant law applicable to the problem *AND* applying the law to the facts of the problem

Company Y sent the letter of acceptance to X by mistake as it intended to contract with another party. The question is thus whether this mistake on the part of company Y is both material and reasonable in terms of the *iustus error* doctrine.

The mistake on the part of company Y relates to an *error in persona*. With this type of error, where a party intends to accept the offer of one party, but mistakenly accepts the offer of

[3] Dale Hutchison and Chris Pretorius (eds), *The Law of Contract in South Africa* (Oxford 2017) 481 and 490.

[4] Dale Hutchison and Chris Pretorius (eds), *The Law of Contract in South Africa* (Oxford 2017) 106 and 110.

another party, such an error is usually material.[5] This applied in *Kok v Osborne*[6] where a party was mistaken as to the identity of the party or parties with whom he was contracting with, and the court held that his mistake was material. And in *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board*[7] a company incorrectly sent a letter of acceptance to the wrong offeror, as it intended to accept the offer from a different offeror, and such a mistake was considered to be material.[8] Therefore, the judgments in *Potato Board* and *Osborne* provides judicial support to reason that the mistake made by company Y was material.[9]

Having established that there was a material mistake, the next leg of the enquiry based on the *iustus error doctrine* is to determine if the mistake company Y made was reasonable. There are usually three instances when a material mistake may be considered to be reasonable.[10]

The first is where the mistake is caused by a misrepresentation on the part of the contract asserter (X). The second is where the contract denier (company Y) is not to blame for his or her mistake. And the third is where the contract denier (company Y) did not cause a reasonable belief in the mind of the contract asserter (X) that the contract denier (company Y) was consenting to the agreement. Firstly, company Y's mistake was not caused by a misrepresentation from X. Secondly, company Y is to blame for the mistake as it addressed and sent the letter of acceptance to the wrong person. Thirdly, company Y instilled a reasonable belief in the mind of X that the company was consenting to the contract. Company Y created this reasonable belief when it sent the letter of acceptance to X, who read it. Therefore, the mistake made by company Y was not reasonable.

The above reasoning is consistent with the finding of the court in *Potato Board*. The facts presented in the assignment are similar to the facts in *Potato Board*.[11] In *Potato Board*, the respondent conducted a tender process for the building of a steel shed. After considering the tenders that were submitted, the respondent then sent a letter of acceptance to the appellant for the erection of the shed. Subsequently the appellant was informed by the respondent that this letter was sent based on an administrative error, and that it actually intended to accept another party's tender. The court held that a legally binding contract was concluded based on the concurring expression of the parties' intentions (the declaration theory). But importantly for purposes of the assignment question, the court further reasoned that if the respondent (as the

[5] Dale Hutchison and Chris Pretorius (eds), *The Law of Contract in South Africa* (Oxford 2017) 88.

[6] 1993 (4) SA 788 (SE). Hereinafter referred to as "*Osborne*".

[7] 1958 (2) SA 473 (A). Hereinafter referred to as "*Potato Board*".

[8] See Dale Hutchison and Chris Pretorius (eds), *The Law of Contract in South Africa* (Oxford 2017) 88 (with footnote 33). At times the courts have complicated matters by indicating that an *error in persona* will only be material if the identity of a party is of vital importance to the party that is mistaken (Dale Hutchison and Chris Pretorius (eds), *The Law of Contract in South Africa* (Oxford 2017) 90). In the assignment scenario presented it would seem that the identity of the correct person that company Y wanted to contract with was of vital importance because according to the company, that party had the necessary skills and expertise for the position, thus making the mistake a material one.

[9] At this stage it is also worth mentioning that because there is no consensus between Company Y and X relating to a material aspect of the agreement with reference to the identity of a party, a legally binding contract was not concluded based on the will theory (see Dale Hutchison and Chris Pretorius (eds), *The Law of Contract in South Africa* (Oxford 2017) 14-16.

[10] Dale Hutchison and Chris Pretorius (eds), *The Law of Contract in South Africa* (Oxford 2017) 104-106.

[11] The facts in the *Potato Board* case are set out in the prescribed textbook (see Dale Hutchison and Chris Pretorius (eds), *The Law of Contract in South Africa* (Oxford 2017) 102).

contract denier) pleaded the *iustus error* defence to escape liability under the contract, this would have failed because the mistake was not reasonable.[12]

The giving of appropriate advice

Based on the application of the *iustus error* doctrine, company Y's mistake is material but it is not reasonable. This means that one of the requirements is not established for this defence to succeed in favour of company Y. Therefore, an enforceable contract was concluded between X and company Y.

Total:[10]

[12] See Dale Hutchison and Chris Pretorius (eds), *The Law of Contract in South Africa* (Oxford 2017) 102 and 109.

1.2 Assignment 02

Question 1

Which statement is **INCORRECT**?

1 A delict constitutes a civil wrong, and in appropriate circumstances, gives rise to a duty to pay damages.

2 In general, a delictual obligation is imposed by law, whereas a contractual obligation is voluntarily assumed by the parties.

3 The law of contract, delict, and unjustified enrichment, do not all relate to the law of obligations.

4 In the absence of a valid contract, an unjustified enrichment claim may arise when there is a transfer of wealth from one person's estate to another person's estate, without a good legal ground or cause for this shift.

5 Sometimes, concurrent contractual and delictual liability can arise, such that the plaintiff may sue the defendant, on either basis. (1)

Answer

3.

Discussion

Option 3 is the correct answer. See Dale Hutchison & Chris Pretorius (eds) *The Law of Contract in South Africa* 3rd ed (Oxford Cape Town 2017) 8, at paragraph 1.4 where it is indicated that the law of contract forms part of the law of obligations, and it further appears that the other branches of the law of obligations include delict and enrichment. And towards the bottom of page 8 of this textbook, it is indicated that the sources of obligations are contract and delict, and unjustified enrichment is also included therein. Therefore, the law of contract, delict, and unjustified enrichment all relate to the law of obligations. Accordingly, the statement made in option 3 above is incorrect.

It follows that all the other statements above are correct. See Dale Hutchison and Chris Pretorius *Contract* 8-10.

Question 2

X makes an offer to sell her watch to Y for R2500. X and Y agree on 15 May that X's offer will be open for acceptance until 31 May. On 20 May, X informs Y that she (X) intends to sell this watch to Z on 30 May. On 21 May, Y informs X that he (Y) accepts the offer, but X refuses to sell the watch to Y. Which statement is **CORRECT**?

1 An option contract was concluded between X and Y on 15 May.

2 An option contract was not concluded between X and Y.

3 From these set of facts, the only legally binding agreement concluded between X and Y occurred on 21 May.

4 After X informed Y on 20 May that she (X) intends to sell the watch to Z, the option contract concluded on 15 May became null and void, but it was subsequently revived on 21 May when Y accepted X's offer.

5 An option contract was concluded on 21 May when Y accepted the offer, and a further contract was concluded for the sale of the watch on this day. (1)

Answer

1.

Discussion

The statement in point 1 above is correct. Where an offer is made by a party (X) and the parties reach an agreement that such an offer will be open for acceptance by the other party (Y) for a specified period of time, in such an instance an option contract is concluded between these parties (see Eiselen GTS et al *Law of Contract study guide for PVL 3702* (University of South Africa) 29). When this reasoning is applied to the facts in the question, it follows that an option contract was concluded between the parties on 15 May. This also means that the statements in points 2, 3 and 5 above are incorrect.

The statement in point 4 above is also incorrect because the option contract never became null and void as Y timeously exercised the option (by accepting the offer) before 31 May.

Question 3

X has a watch that Y likes. On 5 August, X sends a written offer by post to Y, to purchase Y's watch for R10000. One of the terms in the offer is that the offer will lapse on 20 August. The offer also stipulates that X must be aware of the acceptance, for any legal obligations to arise. Y writes the letter of acceptance on 9 August in response to X's offer, and Y posts this written acceptance on 10 August. X's son collects the post from the Post Office on 17 August, and amongst the sealed letters of post collected,is Y's acceptance. X's son is not responsible and only hands all the sealed post to X, on 20 August. On 21 August, X opens the post and reads the acceptance. Which theory under South African law forms as the primary basis to apply when considering if a contract was concluded between the parties?

1 An objective application of the reliance theory.

2 A subjective application of the reliance theory.

3 A subjective application of the will theory.

4 An objective application of the will theory.

5 A subjective application of the declaration theory. (1)

Answer

3.

Discussion

Option 3 is correct. The primary basis to conclude a contract under South African law is in accordance with the will theory, which entails a subjective approach (Dale Hutchison and Chris Pretorius *Contract* 16). It follows that all the other options above are incorrect (see Dale Hutchison and Chris Pretorius *Contract* 14-21).

Question 4

Assume the same facts as in question 3. Which statement(s) is/are **CORRECT**?

1 A valid contract was concluded between X and Y on 10 August, based on the application of the expedition theory.

2 The correct theory to apply is the information theory, therefore a valid contract was not concluded between X and Y.

3 The correct theory to apply is the reception theory, therefore a contract was concluded between X and Y on 20 August.

4 The correct theory to apply is the declaration theory, therefore a valid contract was concluded on 9 August.

5 Options 1 and 2 above. (1)

Answer

2.

Discussion

For this question see Dale Hutchison and Chris Pretorius *Contract* 58-61.

Option 2 is correct. The question deals with when and where an acceptance takes effect. The general rule to determine such an issue is the information theory. In accordance with this theory, the offeror must learn of the offeree's acceptance for the acceptance to have legal effect. And where a time limit has been prescribed for the acceptance to take effect, the offer automatically lapses if it has not been accepted within the prescribed time period (Dale Hutchison and Chris Pretorius *Contract* 56).

The information theory is the general rule, however there are exceptions to the general rule which may apply. One such exception which may apply relates to postal contracts, in which case the expedition theory may apply, provided that all the requirements for this exception can be proved. From the facts given, the offer was made by post and so too was the acceptance. The postal services appear to be operating normally as both parties appear to be receiving their post. And the contract is of a commercial nature which relates to the sale of a watch. Whilst these requirements are met, there is one requirement that is problematic for Y to successfully argue that the expedition theory should apply. **This requirement is that the offeror (X) must not have indicated a contrary intention, expressly or tacitly** (Dale Hutchison and Chris Pretorius *Contract* 61). This means that if the offeror (X) intended or indicated either expressly or tacitly that the contract will not be concluded by post, then the expedition theory will not applyunder such circumstances to determine when and where the acceptance takes legal effect. In this scenario presented, X did indicate a contrary indication as the offer stipulated that X must be aware of the acceptance for any legal obligations to arise. Therefore, the expedition theory does not apply to this question because X only became aware of the acceptance several days after Y posted the acceptance.

The fact that X must be aware of the acceptance for the acceptance to take legal effect, is consistent with the information theory. And because the expedition theory as an exception does not apply, the general rule which is the information theory has to be applied to the set of facts presented. When this application is done the outcome is that a valid contract was not concluded between X and Y because the offer already lapsed when X became aware of the acceptance on 21 August. Therefore option 2 is correct and all the other options are incorrect.

Question 5

X has a watch that Y likes. X offers to sell her watch to Y for R10 000. Y accepts this offer, and X and Y further agree that they will reduce their oral contract to writing and that they will both sign it ("the writing clause"). The parties failed to reduce their contract to writing and sign it. The purpose of the parties' stipulation to reduce their contract to writing and have it signed was to have a written record of their agreement merely to facilitate proof of the terms of the agreement. X insists that a binding contract was not concluded between the parties because the writing clause was never executed by both parties. Y believes that a binding contract was concluded. From this set of facts, the legal dispute which is likely to arise between X and Y, relates to

1 non-variation clauses.

2 the application of statutory formalities.

3 *stipulatio alteri*.

4 the expedition theory.

5 whether a formality has been prescribed by the parties. (1)

Answer

5.

Discussion

The dispute does not relate to a non-variation clause, therefore option 1 is incorrect (see Dale Hutchison and Chris Pretorius *Contract* 169-170 for the application of non-variation clauses). The question does not relate to the application of a statute therefore a statutory formality does not apply. Accordingly, option 2 is incorrect. *Stipulatio alteri* relates to a contract for the benefitof a third party which is not applicable here (see Dale Hutchison and Chris Pretorius *Contract* 237-240 for a discussion of *stipulation alteri*). Therefore option 3 is incorrect. The expedition theory relates to the conclusion of a contract by post which is not an issue that is disputed between X and Y (see Dale Hutchison and Chris Pretorius *Contract* 59-61 for a discussion ofthe expedition theory). It follows that option 4 is incorrect.

The issue disputed between the parties is whether a valid contract was formed between the parties, despite the oral contract not being reduced to writing and signed by the parties. **The issue therefore centres around the intention of X and Y for stipulating a writing clause and whether by doing so, the parties prescribed a formality for the creation of a legally binding contract.** In this regard, see Dale Hutchison and Chris Pretorius *Contract* 168-169. Therefore option 5 is correct.

Question 6

Assume the same facts as in question 5. Which statement(s) is **CORRECT**?

1 Since there is no contrary evidence to suggest otherwise, the law presumes that the oral agreement will not be binding until it is reduced to writing and signed by X and Y.

2 The onus is on Y to prove that the parties (X and Y) intended the writing clause to operate as a requirement for the validity of the contract.

3 Because the intended purpose for the writing clause was to facilitate proof of the terms of the agreement, without compliance with this clause, the terms of the agreement cannot be proved, therefore a binding agreement was not concluded between X and Y.

4 A binding contract of sale was concluded between X and Y.

5 A binding agreement was not concluded between X and Y. (1)

Answer

4.

Discussion

From the facts presented, the issue is whether X and Y intended to create a legal formality for their oral contract to be valid, by stipulating the writing clause. A very important fact in the question is that the purpose of the parties stipulation to reduce their contract to writing and haveit signed was to have a written record of their agreement merely to facilitate proof of the terms ofthe agreement. With this intention, the agreement is legally binding even if it is not reduced to writing and signed by the parties (see Dale Hutchison and Chris Pretorius *Contract* 168). Therefore option 4 is correct. Accordingly, options 3 and 5 are also incorrect.

Since there is no contrary evidence to suggest otherwise, the law presumes that the parties intention to have the writing clause was merely to facilitate proof of the terms of the contract, which means that the oral contract is legally binding. In this regard, see Dale Hutchison and Chris Pretorius *Contract* 168. Therefore option 1 is incorrect.

In these circumstances, the party (X) who alleges that the contract is not legally binding because the writing clause was intended by the parties to be a formal requirement to be complied with for the contract to be valid, bears the onus of proving such an intention (see Dale Hutchison and Chris Pretorius *Contract* 168). Because X bears such an onus and not Y, option2 is incorrect.

Question 7

X sold a painting to Y for R50 000. Assume that in terms of the "Price Control Regulations Act of 2015", the maximum price that this type of painting can be sold for is R30 000. In terms of this Act, a contract of sale at a price in excess of the maximum amount prescribed for this type of painting, is void. Y was aware about the maximum regulation price prescribed for this type of sale, but X was not, when they were negotiating the sale price. X delivered the painting to Y, but Y refuses to pay the purchase price of R50 000. The material focus of this dispute rests on which requirement, relating to the validity of the agreement between X and Y?

1 Legality.

2 Certainty.

3 Consensus.

4 Formalities.

5 Possibility. (1)

Answer

1.

Discussion

From the facts above it appears that the **legality** of the agreement is likely to be in dispute, as the sale price is in contravention of a statutory provision (see Dale Hutchison and Chris Pretorius *Contract* 187). Therefore option 1 is correct. It follows that all the other options are incorrect.

Question 8

Assume the same facts in question 7. Which statement is most **CORRECT**?

1 Contractually, X can claim the painting back as Y has committed a breach of contract.

2 Contractually, X can claim the painting back as Y has been enriched at X's expense.

3 X may probably claim the return of the painting to him (X), because X was not aware of the maximum price regulation prescribed for this type of sale, and Y would be enriched at X's expense if the painting is not returned to X.

4 Because both parties were not in equal guilt, the court will order Y to pay X R50 000.

5 Based on a delictual claim, X may claim R30 000, as this is the extent of Y's enrichment.(1)

Answer

3.

Discussion

The price of R50 000 exceeds the maximum amount prescribed by the statute for this type of sale, and in accordance with the Act, the sale is deemed void. Accordingly, one is dealing with a statutory illegality rendering the sale to be void. Because this illegal contract is void, no contractual obligations arise from such a contract. This means that there is no contractual obligation for either party to perform in accordance with such a contract. Therefore, no contractual cause of action arises from an illegal contract that is deemed void. This is in accordance with the *ex turpi causa non oritur actio* (known as the *ex turpi* rule). A court does nothave a discretion to relax this rule and there are no exceptions to this rule. See Dale Hutchison and Chris Pretorius *Contract* 199. Therefore options 1 and 2 are incorrect because with reference to the *ex turpi* rule a court cannot enforce a contractual claim where a statute renders a contract to be void. Option 4 is also incorrect because an award of R50 000 in favour of X would effectively mean enforcing the contract and with the application of the *ex turpi* rule, a court cannot do this.

Option 3 is correct. A claim for the return of the painting to X, would be a claim for restitution based on unjustified enrichment. So, whilst X cannot pursue a contractual claim in these circumstances, X can nevertheless try to reclaim the performance (painting) she already delivered to Y, with an unjustified enrichment claim. Essentially X will be seeking restitution of the performance she rendered, by claiming the return of the painting to her. The relevant rule that a court will consider in these circumstances is the *in pari delicto potior est conditiopossidentis* (known as the *par delictum* rule). In accordance with this rule, where two parties areequally morally guilty, the party who is in possession is in the stronger position, which prevents restitution from taking place. However, this is not an absolute rule and the court may relax the application of this rule in appropriate circumstances to do justice between the parties, otherwise to strictly apply this rule all the time can lead to a very harsh outcome against the party claiming the return of the performance he or she has already rendered. In this regard, the application of the *par delictum* rule can be relaxed where the party seeking restitution (in this case X who seeks the return of the painting), is less guilty than the other party (Y), or is not morally guilty at all, and where Y would be enriched at the expense of X if this rule is not relaxed. From the facts presented, it is clear that X was not in equal guilt as Y, because X was not aware of the maximum price prescribed for the type of sale in question and Y was aware of the applicable prescribed amount. Y would also be enriched at the expense of X if the *par delictum* rule is not relaxed. It follows that X has a strong case to claim back the painting she delivered to Y, as a court is likely to relax the *par delictum* rule in these circumstances. Therefore option 3 is correct.

Because the appropriate claim rests with unjustified enrichment, and not delict, option 5 is incorrect.

Question 9

Which of the following must a party prove who seeks to set a contract aside on the ground of undue influence?

1 The other party obtained an influence over her.

2 The other party used this influence in an unscrupulous manner to persuade her to agree to a transaction that was prejudicial to her, and which she would not have concluded with normal freedom of will.

3 The other party gained his influence over her by standing in a close relationship to her.

4 Options 1 and 2.

5 Options 1, 2 and 3. (1)

Answer

4.

Discussion

Option 3 is incorrect because even though in most instances of undue influence, there is a close relationship between the parties, such a relationship is not one of the requirements the party seeking to set aside the contract needs to prove. Nevertheless, a relationship of this nature may assist in proving the requirements for undue influence. See Dale Hutchison and Chris Pretorius *Contract* 145-146. It follows that if option 3 is incorrect, then option 5 will also be incorrect.

Options 1 and 2 are correct because they are applicable requirements that must be proved to set a contract aside on the ground of undue influence. See Dale Hutchison and Chris Pretorius *Contract* 145-146. Since options 1 and 2 are correct, it follows that option 4 is the correct answer.

Question 10

Which one of the following statements regarding tacit terms is **INCORRECT**?

1 The courts often employ the officious bystander test to determine whether a contract contains a tacit term.

2 Tacit terms will only be read into a contract if they do not conflict with any of the unambiguous express terms of the contract.

3 Tacit terms will only be read into a contract if it is necessary in a business sense to give efficacy to the contract.

4 Tacit terms must be capable of a clear and exact formulation.

5 Tacit terms are the *naturalia* of the contract. (1)

Answer

5.

Discussion

The statement in option 5 is incorrect, which makes it the correct answer. *Naturalia* are terms automatically included in any contract and are therefore implied by law (*ex lege*). In this sense, generally where the parties have not agreed to exclude *naturalia*, the law reads into the contract the applicable *naturalia*, which becomes enforceable between the parties (Dale Hutchison and Chris Pretorius *Contract* 247). Whereas tacit terms are those that the partiesdid not specifically agree upon, but which (without saying anything) both parties expected to form part of their agreement. Therefore, a tacit term is not a term that is automatically read into the contract *ex lege* (*naturalia*), instead it is a term which the parties are taken to have tacitly agreed to, when successfully applying the officious bystander test. See Hutchison and Pretorius *Contract* 257-258.

The statements in options 1,2 3, and 4 are correct. In this regard, see Dale Hutchison and Chris Pretorius *Contract* 257-258 for the discussion of tacit terms.

2020
Semester 2

Assignment 01

Question

Read the judgments in *Cape Explosive Works Ltd v South African Oil and Fat Industries; Cape Explosive Works Ltd v Lever Brothers (South Africa) Ltd* 1921 CPD 244, *Bal v Van Staden* 1902 TS 128 and *A to Z Bazaars (Pty) Ltd v Minister of Agriculture* 1975 (3) SA 468 (A). Use the cases to identify the relevant examinable section(s) in the prescribed textbook. Study the relevant section of the textbook. **Use these cases and textbook to answer** the following question:

S, who lives in Upington, sends P, who lives in Cape Town, a letter by post in which she offers to sell him her (S's) motorcycle, a collector's piece, for R100 000. She states in her letter that her offer will expire on 1 February. P accepts S's offer by letter which he posts on 8 January. The postal service is disrupted by a strike which starts on 6 January and only ends on 1 February. During this period no post is delivered. S receives the letter only on 7 February and only reads it on the next day. Did a valid contract of sale arise between S and P and, if so,where and when was the contract concluded? **Advise P fully. Substantiate your advice and refer to relevant case law. Do not discuss option contracts.**

TOTAL [10]

Answer

Preliminary steps relating to basic research:

In order to identify the law, which you should apply to the problem, you were asked to:

(1) read three court judgments; and

(2) identify the relevant section(s) in the prescribed textbook.

(1) Read three cases

In *Cape Explosive Works Ltd v South African Oil and Fat Industries; Cape Explosive Works Ltd v Lever Brothers (South Africa) Ltd* 1921 CPD 244, the expedition theory was introduced into South African law. In terms of this theory, if certain requirements are met, a contract is concluded where and when the letter of acceptance was posted by an offeree. In this case, two

offers were made from different companies, to the offeree. The offeree was based in the Cape where it received the offers. The offerors sent their offers by letter through post from Gauteng and Durban, where they were based respectively. In response to both offers, the offeree sent letters of acceptance which were posted at Somerset West in the Cape, and addressed to the offerors. These acceptance letters were then subsequently received and read in Gauteng and Durban respectively, by the respective offerors. The court had to address the issue of whereand when the contracts were concluded. The offerors argued that each contract was concluded in the relevant province where and when the offerors received and read the offerees acceptance. The court disagreed and held that the contracts were concluded at Somerset West,where the letters of acceptance were posted.

From the judgment in *Bal v Van Staden* 1902 TS 128, it seems that the expedition theory can only apply when the postal services are operating normally.

It emerges from *A to Z Bazaars (Pty) Ltd v Minister of Agriculture* 1975 (3) SA 468 (A), that the expedition theory will not apply where the offeror has expressed a contrary intention, either expressly or tacitly.

(2) Identify the relevant section(s) in the textbook

If the "Table of Cases" is consulted at the end of Hutchison and Pretorius (eds) *The Law of Contract in South Africa* 3rd ed (Oxford Cape Town 2017), you will find the pages where *Cape Explosive*, *Bal* and *A to Z* are discussed in the textbook. **Only those relevant pages which are prescribed for you to study are referred to below.**

The relevant page on which *Cape Explosive* appears in the text, is on page 60. The page mainly deals with postal contracts relating to the expedition theory. Accordingly, it explains the framework of how a contract may be concluded by post, and thereafter there is a discussion of this case and the court's ruling. In this case the expedition theory was successfully applied and the court held that the contract was concluded when and where the letter of acceptance was posted. **This does not automatically mean that the expedition theory will apply to the facts in your question. Whether or not the expedition theory applies, will be based on the application of the law to the facts presented.**

Bal appears in footnote 61 on page 60 as authority for the requirement that the postal service should be operating normally for the expedition theory to apply. Therefore, where there is a disruption of such postal services, like in times of war, the expedition theory would probably not apply.

A to Z appears in footnote 66 on page 61 as authority for the requirement that, for theexpedition theory to apply, the offeror must not have indicated a contrary intention, expressly or tacitly. This theory will therefore not apply if the offeror prescribes a different mode of acceptance to be complied with by the offeree, for the contract to be concluded.

Regarding the above cases, the relevant sections of the textbook are pages 60-61 where the application of the expedition theory relating to postal contracts is discussed. The requirements to be met for the expedition theory to apply, are also set out. The application of this theory impacts on determining whether a contract has been concluded, and if so, where and when the contract has been concluded (or put another way, where and when the acceptance took effect). Considering that where and when an acceptance takes effect is applicable to this discussion, means that pages 58-59 are also relevant to the facts in the question.

Identifying the problem

The question is whether P accepted S's offer in time and S and P thus reached consensus and concluded a valid contract of sale. To be more specific, the question relates to the legal rules pertaining to when and where the acceptance takes effect (Hutchison and Pretorius (eds) *The Law of Contract in South Africa* 3rd ed (Oxford Cape Town 2017 58-61)).

Discussing the relevant law applicable to the problem *AND* applying the law to the facts of the problem

In our problem S made an offer to sell her motorcycle in a letter sent to P, by post. In this letter she stated that her offer will expire on 1 February. An offer which has a time limit for acceptance lapses automatically if it is not accepted within the prescribed time period (Hutchison and Pretorius *Contract* 56). P accepted S's offer in a letter that he posted on 8 January, but S only received the letter and read it after the due date for acceptance. The issue is thus whether P timeously and validly accepted the offer on or before 1 February.

The general rule is that a contract only comes into being when the offeror knows that his/her offer has been accepted (Hutchison and Pretorius *Contract* 59). The theory which explains this rule is the information theory. This general rule gives effect to one of the requirements of subjective consensus (Hutchison and Pretorius *Contract* 14) which is the primary basis of contractual liability in accordance with will theory (Hutchison and Pretorius *Contract* 20). If we apply the general rule, it is clear that the offer expired before acceptance, but first it has to be decided whether the general rule (information theory) applies, or whether a recognised exception to the general rule will apply.

There are exceptions to the general rule (Hutchison and Pretorius *Contract* 58-61). One such exception is where the offeror stipulates a different method of acceptance. In this regard, the offeror may dispense with the need for acceptance being communicated to him/her or he/she can indicate in the offer that the contract will come into being at an earlier stage (Hutchison and Pretorius *Contract* 59-60). This may be expressly indicated in the offer itself, but this is not the case in our problem. It may also be implied from all the circumstances, the language of the offer itself and the nature of the contract. None of these implied instances are possibly applicable to the facts presented in the question.

Another exception to the general rule pertains to the expedition theory. Where an offer is made through the post it is assumed (a legal fiction thus), if certain requirements are met that the offeror authorised acceptance by post, as well as indicated that the contract is concluded as soon as the acceptance is posted (*Kergeulan Sealing and Whaling Co v Commissioner of Inland Revenue* 1939 AD 487; *Cape Explosive Works Ltd v South African Oil and Fat Industries; Cape Explosive Works Ltd v Lever Brothers (South Africa) Ltd* 1921 CPD 244; Hutchison and Pretorius *Contract* 60-61). The expedition theory explains the rule pertaining to postal contracts (Hutchison and Pretorius *Contract* 59-61). There are four requirements which must be proved for the expedition theory to apply (see Hutchison and Pretorius *Contract* 61). Three of these requirements are met, in that S made the offer by post; S did not indicate a contrary intention expressly or tacitly, (*A to Z Bazaars (Pty) Ltd v Minister of Agriculture* 1975 (3)SA 468 (A)); and the transaction/contract was of a commercial nature (the anticipated sale of a motorcycle).

However, one of the requirements have not been met, as the facts in the question indicate that the postal services were not operating normally (see Hutchison and Pretorius *Contract* 61). One of the reasons for giving recognition to the application of the expedition theory is because of the general reliability of the post office, as it is presumed that a properly addressed letter will reach its destination (Hutchison and Pretorius *Contract* 60). However, when the postal services are disrupted, the expedition theory would probably not apply (*Bal v Van Staden* 1902 TS 128). In this question, the postal services were disrupted due to a strike, therefore the letter of acceptance addressed to S did not reach S timeously. When the letter of acceptance wasposted by P on 8 January, the strike had already commenced and it clearly had a negative impact on the general reliability of the postal services, as the said letter did not reach its destination timeously. Accordingly, because one of the requirements, being that the postal services must be operating normally (*Bal v Van Staden*), cannot be met, the expedition theory does not apply to this question.

Because an exception (relating to postal contracts in accordance with the expedition theory) does not apply, as a consequence, the general rule (in terms of the information theory) must outof necessity apply: S had to be informed that her offer was accepted before the time of termination of her offer on 1 February, and this did not transpire. Accordingly, by the time she read P's letter on 8 February, her offer had already lapsed. Therefore, on 8 February, there was neither a valid offer nor a legally effective acceptance in place to form an enforceable contract between the parties.

The giving of appropriate advice

P's acceptance was not legally effective, because S did not become aware of it timeously. Therefore, a valid contract of sale was not concluded between S and P.

Total: [10]

Assignment 02

Question 1

X advertises her car for sale in the newspaper for the amount of R40 000. Y reads the advertisement, phones X and accepts her advertisement to sell her car. Which statement most probably reflects the **CORRECT** legal position?

1 X and Y concluded a contract because an offer and acceptance exists.

2 X made an offer to the public at large.

3 Y is the offeree.

4 The advertisement is an invitation to do business.

5 Option 1, 2 and 3. (1)

Answer

4.

Discussion

Option 4 is correct. The general rule in our law is that an advertisement constitutes merely an invitation to do business rather than an offer. See Hutchison & Pretorius (eds) *The Law of Contract in South Africa* 3rd ed (Oxford Cape Town 2017) 53; see also Eiselen GTS et al *Law ofContract study guide for PVL 3702* (University of South Africa) 23. Applying this to the facts above, means that the advertisement is an invitation to do business, which allows Y (as offeror) to make an offer, and X (as offeree) can decide whether to accept the offer. X and Y did not conclude a contract, because even if there was an offer from Y, there is no evidence of X accepting an offer. Therefore option 1 is incorrect. X did not make an offer to the public, as it wasmerely an invitation to do business. Accordingly, option 2 is incorrect. X is the offeree, therefore,option 3 is incorrect. It follows that option 5 is also incorrect.

Question 2

X and Y conclude a contract under circumstances wherein X threatened Y. This threat may be used to prove an element of

1 duress.

2 undue influence.

3 misrepresentation.

4 contractual illegality.

5 material mistake. (1)

Answer

1.

Discussion

You have to look at what the requirements of each option are to answer this question. The presence of a threat is one of the elements that must be proved to establish duress (Hutchison and Pretorius *Contract* 140-144; Eiselen et al *Study Guide* 59-60). None of the other options requires the existence of a threat to be proven as a requirement.

Question 3

Tony, a petrol attendant, sells heroin to Samuel for R1 000. Tony delivers the heroin to Samuel, but Samuel refuses to pay. Section 5 of the Drugs and Drug Trafficking Act 140 of 1992 provides that no person shall deal in (a) any dependence-producing substance or (b) any dangerous dependence-producing substance or any undesirable dependence-producing substance, while section 4 prohibits the possession of such substances. Section 13 makes the contravention of both sections 4 and 5 a crime. Heroin is furthermore an undesirable dependence-producing substance. Tony approaches a court to assist him, either for the payment of R1 000 from Samuel or the return of the drugs. The material focus of this dispute rests on which requirement relating to the validity of the agreement between Tony and Samuel?

1 Consensus

2 Formalities

3 Possibility

4 Legality

5 Certainty (1)

Answer

4.

Discussion

The contract entered into between Tony and Samuel is illegal because it is in contravention of sections 4 and 5 of the Drugs and Drug Trafficking Act 140 of 1992. The material focus therefore is likely to be on the legality requirement, which impacts on the validity of the agreement. Accordingly, option 4 is correct. See Hutchison and Pretorius *Contract* 187-189, 199-201. It follows, that options 1,2,3 and 5 are incorrect.

Question 4

Assume the same facts as in question 3. Most relevant to the dispute would be to consider the application of

1 the *ex turpi* rule and the *par delictum* rule.

2 statutory illegality and restraint of trade agreements.

3 public interest and rectification.

4 the *par delictum* rule and capacity of the parties to contract.

5 the *ex turpi* rule and *stipulatio alteri*. (1)

Answer

1.

Discussion

Based on the facts, the question does not relate to restraint of trade agreements, rectification, capacity of the parties to contract, and *stipulatio alteri*. It follows that options 2, 3, 4, and 5 are incorrect. Option 1 is the only combination that relates to the consequences of an illegal contract, and therefore it is the correct answer. These consequences apply in accordance with the the *ex turpi* rule and the *par delictum* rule, in circumstance where the illegal contract is deemed void (see Hutchison and Pretorius *Contract* 199-201). Therefore, the first issue to address is whether the illegal contract between Tony and Samuel is also **void**.

In terms of the Act, dealing in drugs (heroin) is prohibited, therefore a contract of sale for drugs is illegal. Where a statute **expressly** states that such a contract is void, or is of no force or effect, then clearly this will be the case. In the facts of the question, there is no mention that the statute expressly renders a contract of this nature to be void. Therefore, it needs to be considered if the legislator **impliedly** intended that such a contract must be null and void. If it was impliedly intended to be a nullity, then the contract will be void. To determine if the legislator impliedly intended the contract to be void, the cumulative effect of a number of factors must be considered (see Hutchison and Pretorius Contract 188, for a discussion of these factors). When these factors are applied to the facts in the question, then it appears that the legislator impliedly intended that the illegal contract between Tony and Samuel, be rendered void. The motivation for this is that the legislator clearly prohibited the dealing and possession ofundesirable dependence-producing substances like heroin to deter members of the public from being exposed to the intake and harmful effects of this drug. To validate such a contract will therefore bring about the harm that the statute is directed against, which is an indication that thelegislator intended the contact between Tony and Samuel to be void. In terms of the Act, Tony's conduct constitutes a crime (dealing and being in possession of an undesirable dependence- producing substance). The Act does not merely serve to protect the revenue of the state, as the prohibition of dagga is intended to protect the health of all members of society from the harmful effects of this undesirable substance. As this entails protecting a public interest, is a further indicator that the legislator intended the contract between Tony and Samuel to be void. Nullifying the contract will definitely not cause greater inconvenience and injustice, therefore the contract should be deemed **void**.

Having established that the contract between Tony and Samuel was both illegal and void, the next *it is appropriate to look at the consequences of a contract that is void for illegality*. These consequences are that, based on the *ex turpi* rule, an illegal contract is void and that no contractual obligations arise out of it, which is relevant to this question. Where a contract is void in terms of an illegal contract, restitution of what was performed may possibly be claimed, based on an unjustified enrichment claim. However, where the parties are equally morally guilty, the *par delictum* rule can operate to prevent restitution from taking place. As Tony has already performed by delivering the heroin drugs to Samuel, he may want to claim restitution of this performance. Therefore, the *par delictum* rule is also relevant to this question. Accordingly, the

application of both rules, the *ex turpi* rule and the *par delictum* rule are applicable to this question. Therefore option 1 is correct. See Hutchison and Pretorius *Contract* 199-201.

Question 5

Assume the same facts as in question 3. The court hearing this dispute is likely to find that

1 Tony can claim R1 000 contractual damages from Samuel.

2 Tony will be granted an order for specific performance for the return of the heroin.

3 Tony's request for the return of the heroin will fail because both parties were equally morally guilty.

4 Tony's claim for a R1 000 from Samuel will succeed, but his claim for the return of the heroin will fail because the contract between both parties was only partially illegal.

5 In order to achieve justice between man and man, Samuel should pay Tony half of the claim, which amounts to R500. (1)

Answer

3.

Discussion

As alluded to above, the contract entered into between Tony and Samuel is illegal because it is in contravention of sections 4 and 5 of the Drugs and Drug Trafficking Act 140 of 1992. This means that the contract is void due to illegality. The first consequence of a void contract due to illegality is that the contract cannot be enforced. This is in accordance with the the *ex turpi* rule, which always applies and cannot be relaxed. Therefore, contractual damages and a specific performance order based on the illegal contract cannot be granted. This means that options 1 and 2 are incorrect.

Where a contract is void, but there has been performance, restitution should generally be granted in principle. However, the *par delictum* rule provides that where two parties are equally morally guilty, the one who is in possession is in the stronger position and in such circumstances, this rule will prevent restitution from taking place. Both Tony and Samuel are most likely to have been aware of the illegality of buying and selling heroin drugs and therefore they are both equally morally guilty. As Samuel is in possession of the drugs, the enforcementof the par delictum rule is likely to prevent Tony from reclaiming the heroin, because of the equal moral guilt of both parties. This is likely to be the courts finding, therefore, option 3 is correct. Because this is a case of equal moral guilt of both parties, the court will not be inclined to relax the *par delictum* rule to achieve justice between man and man. Therefore option 5 is incorrect.

The entire agreement is illegal, and as such, it is not partially illegal. Accordingly, option 4 is incorrect.

See Hutchinson and Pretorius Contract 181, 190-192.

Question 6

X places an advertisement in the newspaper in which he offers to sell his car, a Porsche Carrera, for R800 000. X states that the Porsche is a 1995 model in the advertisement, while it is in fact a 1994 model which has been registered for the first time in 1995. X knows that this statement in the advertisement is untrue. Y reads the advertisement, phones X and concludes acontract of sale with X. The statement in the advertisement regarding the year model amountsto

1 fraud.

2 mere puffing.

3 a *dictum et promissum*.

4 a guarantee in the contract.

5 both fraud and a *dictum et promissum*. (1)

Answer

5.

Discussion

X knowingly made a false statement in the advertisement regarding the year model of the Porche. This statement does not amount to mere puffing because it goes beyond singing the praises of the Porche (see Hutchison and Pretorius *Contract* 123). The statement is not mere puffing, as it amounts to a misrepresentation (see the discussion in the next paragraph regarding this). Option 2 is thus incorrect.

Option 1 and option 3 are correct. Option 1 is correct because the statement complies with the requirements for fraudulent misrepresentation (Hutchison and Pretorius *Contract* 129). There was a false statement which X knew to be false, and intended readers to act upon and which indeed induced Y to conclude a contract with X. Option 3 is also correct because the statement complies with the definition of a *dictum et promissum* (Hutchison and Pretorius *Contract* 123). The statement was made during negotiations, bearing on the quality of the Porche (because it related to the year model) and was not mere puffing, as it went beyond mere praise and commendation. It was a material statement because it induced Y to conclude the contract with X. As options 1 and 3 are correct, this means that option 5 is correct.

Based on the facts, option 4 is incorrect because the false statement in the advertisement never became a term in the contract of sale (Hutchison and Pretorius *Contract* 121-2).

Question 7

John agrees with Michael, that Michael will paint John's holiday home at the coast for R30 000. Unbeknown to either of them the house had been destroyed in a storm the previous day. This is a case of

1 mutual mistake.

2 supervening impossibility of performance.

3 impossibility of performance.

4 an obligation subject to a resolutive condition.

5 an obligation subject to a suspensive condition. (1)

Answer

3.

Discussion

Option 1 is incorrect because both John and Michael are not mistaken about each other's intentions or are not at cross-purposes (Hutchison and Pretorius *Contract* 84). They both agreed on the painting of John's holiday home for R30 000.

Option 2 is incorrect. Supervening impossibility of performance only becomes relevant to consider, when a valid contract has been concluded and the objective impossibility only arises *after* the conclusion of the contract. In this scenario, it became impossible to paint the house *before* the agreement was reached between the parties, and not *after* they reached their agreement. See Hutchison and Pretorius *Contract* 216, 395.

Option 3 is correct since it is objectively impossible to paint a house that has been destroyed. This impossibility already existed when the contract was concluded. Where performance is already objectively impossible when the parties conclude an agreement (which is applicable to this scenario), this is a case of impossibility of performance. See Hutchison and Pretorius *Contract* 213-214.

Option 4 is incorrect because there is no term in John and Michael's agreement that determines that the performances come to an end if an uncertain future event does or does not occur (Hutchison and Pretorius *Contract* 260-261).

Option 5 is incorrect as John and Michael did not agree that the contract to paint the holiday home will only be enforceable if an uncertain future event does or does not occur. (Hutchison and Pretorius *Contract* 260-261).

Question 8

X and Y conclude a contract, in terms of which X rents a house from Y for R2 000 a month until she finds work in Cape Town. The contract is subject to a

1 suspensive condition.

2 resolutive condition.

3 suspensive time clause.

4 resolutive time clause.

5 modus. (1)

Answer

2.

Discussion

The rental contract will run until X finds work in Cape Town, and if this happens, the obligations will then come to an end. This clause is thus a resolutive condition, as it is uncertain whether X will find work in the future in Cape Town. This also means that it is not a time clause because it is not certain that X will find work in Cape Town. See Hutchison and Pretorius *Contract* 260. Option 2 is thus correct and options 1, 3 and 4 are incorrect.

The clause is not *modus*, because it is not a term that places a duty on X or Y to do something in the future (Hutchison and Pretorius *Contract* 262). Option 5 is thus incorrect

Question 9

Koos and Ronald are owners of champion horses. They regularly buy horses from each other for breeding purposes. On one occasion Koos purchased a stallion from Ronald. It turned out that the stallion had a rare and deadly disease at the time of the purchase. Within two months ofthe purchase, the stallion died from the illness. Koos wishes to cancel the contract and claim back the purchase price (R400 000) he paid, on the basis that Ronald breached a material term of the contract that “the stallion will be free from any illness that is deadly”. From the facts given,the material term relied upon by Koos, could be

1 a tacit term or a *naturalium* (singular of *naturalia*).

2 an express term or an *incidentalium* (singular of *incidentalia*).

3 a term implied by law or an *essentialium* (singular of *essentialia*).

4 a *naturalium* or an express term.

5 none of the above. (1)

Answer

The students were given the mark for this question. The problem is that the word “or” in most of the options means that more than 1 option can be correct.

Question 10

X inherits a watch which Y is interested in buying. Both X and Y believe the watch to be a genuine Rolex and know of each other's belief. When they conclude the contract, Y tells X that he is only buying the watch because it is a Rolex. However, it turns out to be only an imitation. This is most probably a case of a

1 resolutive condition.

2 error in motive.

3 suspensive condition.

4 supposition.

5 option 1 and 4. (1)

Answer

4.

Discussion

Option 4 is correct. Parties may decide to conclude a contract on the supposition or assumption, that a certain state of affairs exists or existed. The supposition or assumptionmust be shared by both parties in order to form the basis for concluding the contract. Based on the facts above, the basis for concluding the contract which was shared by both parties wasthat the watch was a Rolex. Since the supposition turned out to be false, the contract is void. See Hutchison and Pretorius *Contract* 262.

Option 2 is incorrect. There was no error with regard to Y’s intention (error in motive), and both parties shared the understanding that a state of affairs was present, that being that the watch was a Rolex. If only one of the parties assumed that the watch was a Rolex, then such a mistake by one of the parties may have been considered legally irrelevant and perhaps tantamount to an error in motive (Hutchison and Pretorius *Contract* 89, 262). However, given that both parties shared this assumption, this is not a case of error in motive. See Hutchison and Pretorius *Contract* 262.

Options 1 and 3 are incorrect. There is a difference between a supposition and conditions such as a resolutive and suspensive conditions. The difference is that a condition relates to a future uncertain event, whereas a supposition pertains to a past or present state of affairs. The basis for concluding the contract being that the watch is a Rolex did not relate to a future uncertain event. Therefore options 1 and 3 are incorrect. See Hutchison and Pretorius *Contract* 260, 262.

It follows that if option 1 is incorrect, then option 5 is also incorrect.

2 EXAMPLES OF ERROR AND DAMAGES PROBLEM QUESTIONS

Students very often have difficulty in understanding error and damages, and experience difficulty with the application of the law to the facts of a problem. We have thus decided to discuss two error problems and one problem on damages. **PLEASE TAKE NOTE THATTHESE ARE NOT SPOT QUESTIONS FOR THE MULTIPLE CHOICE QUESTION EXAMINATION, but they are presented to assist you to have a better understanding of these sections.**

Question 1

X, an organiser of art exhibitions, contracted with Y for an exhibition to be held on 24 to 27 July. These dates were the only dates mentioned during the negotiations. After having been pressurized by X, Y hurriedly signed the standard form contract without reading it. The contract contained a clause permitting X to change the dates of the exhibition unilaterally. Thereafter X changed the dates. X had no reason to believe that Y would have signed the contract if he had known of the term. Y averred that the contract was void. Will Y succeed in his attempt to have the contract set aside? Substantiate your answer and refer to relevant case law. Apply the **direct reliance approach** of the courts in answering this question. Do not apply the **Consumer Protection Act** to this question. (10)

Answer

Identifying the problem

The facts seemingly indicate that X and Y have not reached consensus based on the will theory. If so, it is necessary to determine if Y may be held bound to a contract with X, based on the reliance theory, or whether Y will escape liability. Only the direct approach to the reliance theory will be considered.

Discussing the relevant law applicable to the problem, referring to the relevant case law, *AND* applying the law to the facts of the problem

The direct reliance approach can only be applied after it has been determined that Y acted under a material mistake. It must thus be determined whether agreement (*consensus ad idem*) as a contractual basis exists between the parties, as required in terms of the will theory.

The first step is to determine whether agreement (*consensus ad idem*) as a contractual basis exists between the parties, as required in terms of the will theory. Consensus has threeelements (Hutchison and Pretorius (eds) *The law of Contract in South Africa* **(**Oxford University Press Southern Africa 2012) 14 85): the parties must seriously intend to contract, be of onemind as to the material aspects of the proposed agreement (the terms and the identity of the parties to it), and be conscious of the fact that their minds have met.

In the present case the parties were not in agreement as to the consequences they wished to create: Y thought that the dates for the art exhibition (X's performance) was fixed, while X knew that the contract allowed X to unilaterally change the dates. This is a mistake as to theobligations the parties wished to create which excludes *consensus* between the parties (Hutchison and Pretorius *Contract* 86). No contract can arise on the basis of the will theory. Thistype of mistake can be illustrated with a number of cases.

In *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 (4) SA 164 (D) the plaintiff believed that he was purchasing the erf shown to him by the seller's agent, while the written contract that he signed indicated a completely different property. His mistake related to performance and was material. See also *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 889 (A). The appellant signedan agreement containing a term excluding the respondent from liability for misrepresentation. Finally see *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (2) SA 234 (A) where the appellant erred with regard the period of thelease which was an aspect of the performance.
The direct reliance approach can now be applied to the facts of the problem (Hutchison and Pretorius *Contract* 18-19 95-97 103-105). The court stated the test in *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (2) SA 234 (A) 239-240 as follows:

> In my view, therefore, the decisive question in a case like the present is this: did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention? … To answer this question, a three-fold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party's intention; secondly, who made that representation; and thirdly, was the other party misled thereby? … The last question postulates two possibilities: Was he actually misled and would a reasonableman have been misled?

A discussion of *Ridon v Van der Spuy and Partners (Wes-Kaap) Inc* 2002 (2) SA 121 (K) and *Steyn v LSA Motors Ltd* 1994 (1) SA 49 (A) will also be appropriate.

By signing the contract, Y, a party to the contract, misrepresented his intention to be bound by the clause allowing X to unilaterally change the dates. X knew that the only dates mentioned during the negotiations were 24 to 27 July, that Y hastily signed the contract and that the contract had a clause allowing X to unilaterally change the dates. Although it could be argued

that X was not actually misled by Y's misrepresentation, it is clear that a reasonable person would not have been misled in any case. Indeed, X had no reason to believe that Y would have signed the contract had Y known of the term allowing X to change the dates of the exhibition unilaterally. In fact X had a legal duty to point out the presence of this clause in the agreementto Y. There was either no actual or at least reasonable reliance on the part of X.

The giving of appropriate advice

Y is not bound by the agreement with X because of the lack of actual and apparent consensus.

Total: [10]

Question 2

X, an organiser of art exhibitions, contracted with Y for an exhibition to be held on 24 to 27 July. These dates were the only dates mentioned during the negotiations. After having been pressurized by X, Y hurriedly signed the standard form contract without reading it. The contract contained a clause permitting X to change the dates of the exhibition unilaterally. Thereafter X changed the dates. X had no reason to believe that Y would have signed the contract if he had known of the term. Y averred that the contract was void. Will Y succeed in his attempt to have the contract set aside? Substantiate your answer and refer to relevant case law. Apply the **indirect reliance approach** of the courts in answering this question. Do not apply the **Consumer Protection Act** to this question. (10)

Answer

Identifying the problem

The facts seemingly indicate that X and Y have not reached consensus based on the will theory. If so, it is necessary to determine if Y may be held bound to a contract with X, based on the reliance theory, or whether Y will escape liability. Only the indirect approach to the reliance theory will be considered.

Discussing the relevant law applicable to the problem, referring to the relevant case law, *AND* applying the law to the facts of the problem

The indirect approach is the *iustus error*-approach. A party who acted under a mistake and wishes to escape liability (Y in our case) must prove that his / her mistake is material and reasonable.

At the outset it must be determined whether agreement (*consensus ad idem*) as a contractual basis exists between the parties, as required in terms of the will theory. Consensus has three elements (Hutchison and Pretorius (eds) *The law of Contract in South Africa* Oxford University Press Southern Africa 2012 14 85): the parties must seriously intend to contract, be of one mind as to the material aspects of the proposed agreement (the terms and the identity of the parties to it), and be conscious of the fact that their minds have met.

In the present case the parties were not in agreement as to the consequences they wished to create: Y thought that the dates for the art exhibition (X's performance) was fixed, while X knew that the contract allowed X to unilaterally change the dates. This is a mistake as to theobligations the parties wished to create which excludes *consensus* between the parties

(Hutchison and Pretorius *Contract* 86). No contract can arise on the basis of the will theory. This type of mistake can be illustrated with a number of cases.

In *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 (4) SA 164 (D) the mistake related to performance and was thus material. The plaintiff believed that he was purchasing the erf shown to him by the seller's agent, while the written contract that he signed indicated the correct erf which was a completely different property. His mistake related to performance and was material. See also in *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 889 (A), the appellant signed an agreement containing a term excluding the respondent from liability for misrepresentation.Finally see *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (2) SA 234 (A) where the appellant erred with regard the period of thelease which was an aspect of the performance.

However, the matter does not end here, because Y still has to prove that his mistake is reasonable. A mistake will generally be reasonable (Hutchison and Pretorius *Contract* 100-103) in three instances of which only one is relevant, to this question.

Where the mistake was induced or caused by the failure of the contract enforcer to remove an incorrect impression (*ommissio*). Here it will only be wrongful if the contract enforcer breached a legal duty to speak in the circumstances. Such a duty will usually exist (Hutchison and Pretorius *Contract* 101-102) where the contract assertor knows or ought to know as a reasonable person

that the other party is mistaken, or where the contract assertor, before the conclusion of the

contract, created an impression which is in direct conflict with the agreement he or she seeks to enforce. Under these circumstances, the contract assertor must draw the contract denier's attention to this discrepancy. (See the *Du Toit* case; Hutchison and Pretorius *Contract* 101-102).

In this question, the only dates mentioned during negotiations (for the exhibition) were 24-27 July. Since X had no reason to believe that Y would have signed the contract had Y known ofthe term allowing X to change the dates of the exhibition unilaterally, he (X) had a legal duty to point out this clause to Y. X's failure to do so, renders Y's material mistake reasonable.

The giving of appropriate advice

Y is not bound by the agreement with X because of the lack of actual and apparent consensus.

Total: [10]

Question 3

X contracts with Y for the latter (Y) to build and fit a security gate for the entrance of her (X's) home. Y builds the gate and fits it with an electric motor which is activated with a remote control. X is satisfied with the work and pays Y the contractual amount agreed upon. A week later the gate gets stuck while it is half way open as a result of defective materials used to build the gate.

When X attempts to physically move the gate to close it fully, she suffers such severe damage to her left knee that she has to have a knee operation. Her medical costs are R20 000. The costs of repairing the gate amount to R15 000. X wants to claim both her medical costs, as well the cost of repairing the gate from Y. Advise X if she will be successful with her claim. (20)

Answer

Identifying the problem

This question deals with one of the remedies for breach of contract by Y, as she used defective materials to build the gate. As a result of this breach, X now seeks to claim damages. The type of breach that has transpired is positive malperformance on the part of Y, and the damages claimable by X will be determined on the basis of whether such damages constitute general or special damages.

Discussing the relevant law applicable to the problem, referring to the relevant case law, *AND* applying the law to the facts of the problem

Is X entitled to compensated for both her medical costs (R20 000), as well the cost of repairing the gate (R15 000) from Y.

In order to succeed with a claim for damages as a result of a breach of contract the innocent party must prove the following:

(1) Breach of contract has occurred.

(2) The innocent party) has suffered financial or patrimonial loss

(3) There is a factual causal link between the breach and the loss

(4) The loss is not too remote a consequence of the breach (legal causation)

(1) Breach of contract has occurred

Positive malperformance takes place where a contracting party does not comply with the terms of the contract either by performing something in a manner which does not comply with the terms of the contract, or by doing something which he undertook not to do.

In this question, it is either a tacit term or a term implied by law that the gate will not be built with defective materials. Therefore Y's breach constitutes positive malperformance.

(2) The innocent party must suffer patrimonial loss

Breach of contract *per se* does not give rise to a claim for damages, unless patrimonial loss has actually been incurred. The plaintiff must prove actual pecuniary or patrimonial loss. Patrimonial loss is a loss suffered by the estate of the person concerned.

To ascertain whether damage has been suffered as a result of breach of contract, one compares the present value of the creditor's estate with the value it would have had, had the breach of contract not occurred (the difference rule). In other words in the case of breach of contract one compares the present value of the innocent party's estate with the value it would have had, had the contract been carried out properly and on time. If the present value is less

than it would have been, damage has been suffered. The debtor must place the creditor in the same patrimonial position as he would have been in had proper and timeous performance taken place. This is the measure or formula applied for damages and is referred to as positive interest.

The innocent party has to receive his positive interest - in contrast with negative interest; that is the compensation payable if the injured party would have to be placed in the position in which he would have been, had the contract never been entered into.

In this problem it is clear that damages have been suffered by X, in the form ofR20 000 (for the medical costs) and R15 000 (for the cost of repairing the gate).

(3) Causation

Factual causation

There must be a causal connection between the breach of contract and damage. The damage must be caused by the breach of contract. The question is whether the damage would have been incurred if the guilty party had properly fulfilled her part of the contract. A certain result is caused by a certain act if that result would not normally have ensued but for such act (*conditio sine qua-non*-test).

The innocent party needs to prove, on a balance of probabilities, that the loss would not have been suffered but for the breach. If she fails to establish this causal link, that is the end of the enquiry and the damages claim must fail.

Factual causality is present in this problem. If Y did not breach the contract, the gate would not have needed repair. Furthermore, if Y did not breach the contract the gate would have not have got stuck, X would not have tried to open the gate and X would not have been injured.

Legal causality

The question which arises after factual causation has been established is whether the innocent party may hold the other party liable for all the consequences of the breach. In the interests of fairness to the party that commits a breach of contract, a line must be drawn between damages caused by her breach and for which he is to be held liable, and damages which, although caused by the breach, are so remote from it that he should not be held liable for them. It is oftenvery difficult to make this distinction.

In regard to this issue, it is important to understand the distinction made by our courts between general and special damages (*Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A)).

(a) General damages

General damages are those which flow naturally and generally from the specific kind of breach that has been committed. They are the sort of damages that might be expected in the ordinary course of things to result from the breach. As such, they would have been foreseeable to a reasonable person entering into the contract as a probable consequence. The party that commits a breach of contract is held liable, without further ado, for general damages.

An example of general damages is the cost of repairing or replacing defective goods. The repair costs (R15 000) of the gate are thus general damages. X is likely to be successful in this claim.

It is not clear whether the medical costs are general damages or not. On the one hand it could be argued that a reasonable person entering into the contract would foresee that the use of defective materials could result in X sustaining injuries as a probable consequence, but the contrary could more convincingly be argued. The question then arises whether the medical costs could be claimed as special damages.

(b) Special damages

All damages that cannot be classified as general damages are special damages. Special damages are those which do not flow naturally and generally from the specific kind of breach of contract. The party that commits a breach of contract will be liable for special damages only in certain circumstances. The innocent party must prove:

(i) the damages were actually foreseen or reasonable foreseeable at the time of entry into the contract (the contemplation principle); and

(ii) the parties must have entered into the contract on the basis of their knowledge of the special circumstances, and thus can be taken to have agreed, expressly or tacitly, that there would be liability for damages arising from such special circumstances (the convention principle).

It is unlikely that X will succeed with her claim for special damages. X and Y did not actually foresee that as a result of such a breach, X would physically injure herself (the contemplation principle). The parties clearly did not agree explicitly or presumably that such damages would be paid (in line with the convention principle). X’s claim for medical costs would thus be unsuccessful.

The giving of appropriate advice

X will succeed with her claim for the repair costs, but most probably not for her medical costs.

2020
Semester 1

1.1 Assignment 01

Question

Read the judgments in *Cape Explosive Works Ltd v South African Oil and Fat Industries; Cape Explosive Works Ltd v Lever Brothers (South Africa) Ltd* 1921 CPD 244, *Bal v Van Staden* 1902 TS 128 and *A to Z Bazaars (Pty) Ltd v Minister of Agriculture* 1975 (3) SA 408 (A). Use the cases to identify the relevant examinable section(s) in the prescribed textbook. Study the relevant section of the textbook. **Use these cases and textbook to answer** the following question:

S, who lives in Upington, sends P, who lives in Cape Town, a letter by private courier in which she offers to sell him her (S's) motorcycle, a collector's piece, for R100 000. She states in her letter that her offer will expire on 1 February. P accepts S's offer by letter which he posts on 31 January. S receives the letter on 7 February and only reads it on the next day. Did a valid contract of sale arise between S and P and, if so, when and where was the contract concluded? **Advise P fully. Substantiate your advice and refer to relevant case law. Do not discuss option contracts.**

TOTAL ASSIGNMENT 01 [10]

Answer

In order to identify the law, which you should apply to the problem, you were asked to:

(1) read three court judgments; and

(2) identify the relevant section(s) in the prescribed textbook.

(1) Read three cases

In *Cape Explosive Works Ltd v South African Oil and Fat Industries; Cape Explosive Works Ltd v Lever Brothers (South Africa) Ltd* 1921 CPD 244, the expedition theory was introduced into South African law. In terms of this theory, if certain requirements are met, a contract is concluded where and when the letter of acceptance was posted by an offeree. In this case, two offers were made from different companies, to the offeree. The offeree was based in the Cape where it received the offers. The offerors sent their offers by letter from Gauteng and Durban, where they were based respectively. In response to both offers, the offeree sent letters of acceptance which were posted at Somerset West in the Cape, and addressed to the offerors. These acceptance letters were then subsequently received and read in Gauteng and Durbanrespectively, by the respective offerors. The court had to address the issue of where and when the contracts were concluded. The offerors argued that each contract was concluded in the relevant province where and when the offerors received and read the offerees acceptance. The court disagreed and held that the contracts were concluded at Somerset West, where the lettersof acceptance were posted.

From the judgment in *Bal v Van Staden* 1902 TS 128, it seems that the expedition theory can only apply when the postal services are operating normally.

It emerges from *A to Z Bazaars (Pty) Ltd v Minister of Agriculture* 1975 (3) SA 408 (A), that the expedition theory will not apply where the offeror has expressed a contrary intention, either expressly or tacitly.

(2) Identify the relevant section(s) in the textbook

If the "Table of Cases" is consulted at the end of Hutchison and Pretorius (eds) *The Law of Contract in South Africa* 3rd ed (Oxford Cape Town 2017), you will find the pages where *Cape Explosive*, *Bal* and *A to Z* are discussed in the textbook. **Only those pages which are prescribed for you to study are referred to below.**

The relevant page on which *Cape Explosive* appears in the text, is on page 60. The page mainly deals with postal contracts relating to the expedition theory. Accordingly, it explains the framework of how a contract may be concluded by post, and thereafter there is a discussion of this case and the court's ruling. In this case the expedition theory was successfully applied and the court held that the contract was concluded when and where the letter of acceptance was posted.

Bal appears in footnote 61 on page 60 as authority for the requirement that the postal service should be operating normally for the expedition theory to apply. Therefore, where there is a disruption of such postal services, like in times of war, the expedition theory would probably not apply.

A to Z appears in footnote 66 on page 61 as authority for the requirement that, for the expedition theory to apply, the offeror must not have indicated a contrary intention, expressly or tacitly. This theory will therefore not apply if the offeror prescribes a different mode of acceptance to be complied with by the offeree, for the contract to be concluded.

Regarding the above cases, the relevant sections of the textbook are pages 60-61 where the application of the expedition theory relating to postal contracts is discussed. The requirements to be met for the expedition theory to apply, are also set out. The application of this theory impacts on determining whether a contract has been concluded, and if so, where and when the contract has been concluded (or put another way, where and when the acceptance took effect).

Identifying the problem

The question is whether P accepted S's offer in time and S and P thus reached consensus. To be more specific, the question relates to the legal rules pertaining to when and where the acceptance takes effect (Hutchison and Pretorius (eds) *The Law of Contract in South Africa* 3rd ed (Oxford Cape Town 2017 58-61)).

Discussing the relevant law applicable to the problem *AND* applying the law to the facts of the problem

In our problem S made an offer to sell her motorcycle by letter delivered by a private courier. In this letter she stated that her offer will expire on 1 February. An offer which has a time limit for acceptance lapses automatically if it is not accepted within the prescribed time period (Hutchison and Pretorius *Contract* 56). P accepted S's offer in a letter that he posted on the 31 January, but S only received the letter and read it after the due date for acceptance. The question is thus whether P validly accepted the offer on or before 1 February.

The general rule is that a contract only comes into being when the offeror knows that his/her offer has been accepted (Hutchison and Pretorius *Contract* 59). The theory which explains this rule is the information theory. This general rule gives effect to one of the requirements of

subjective consensus (Hutchison and Pretorius *Contract* 14) which is the primary basis of contractual liability (Hutchison and Pretorius *Contract* 20). If we apply the general rule, it is clear that the offer expired before acceptance, but first it has to be decided whether the general rule (information theory) applies, or whether a recognised exception to the general rule will apply.

There are exceptions to the general rule (Hutchison and Pretorius *Contract* 58-61). The offeror as *dominus* may dispense with the need of acceptance being communicated to him /her or can indicate in the offer that the contract will come into being at an earlier stage (Hutchison and Pretorius *Contract* 59-60). This may be expressly indicated in the offer itself, but this is not the case in our problem. It may also be implied from all the circumstances, the language of offer itself and the nature of the contract. Not one of these implied instances are possibly applicable in our facts.

Where an offer is made through the post it is assumed (a legal fiction thus), if certain requirements are met that the offeror authorised acceptance by post as well as indicated that the contract is concluded as soon as the acceptance is posted (*Kergeulan Sealing and Whaling Co v Commissioner of Inland Revenue* 1939 AD 487). The expedition theory explains the postal rule. The postal rule is, however, not applicable to our problem as the offer was not made by post, which is one of the requirements to be met for the expedition theory to apply.

As a consequence, the general rule (in terms of the information theory) must out of necessity apply: S had to be informed that her offer was accepted before the time of termination of her offer, and this did not transpire. Accordingly, by the time she read P's letter on 8 February, her offer had already lapsed, and could not be validly accepted.

The giving of appropriate advice

No contract of sale came into being because P failed to accept S's offer timeously. S may thus validly refuse to accept P's performance in terms of an invalid contract.

Total: [10]

1.2 Assignment 02

Question 1

Y and Z reach an agreement that should Y sell his leather couch, he (Y) will offer to sell it to Z first, before making an offer to sell the couch to any other person. Which statement is **CORRECT**?

1 Y and Z concluded an option contract.

2 Y and Z concluded a pre-emption contract.

3 Y and Z concluded neither an option contract nor a pre-emption contract.

4 Y and Z concluded an option contract and a pre-emption contract.

5 Y and Z concluded a contract subject to a resolutive condition. (1)

Answer

2.

Discussion

An option is a contract to keep an offer open for acceptance for a certain period of time (Eiselen GTS et al *Law of Contract study guide for PVL 3702* (University of South Africa) 29. Clearly Y and Z did not conclude such an agreement relating to the leather couch. Therefore options 1, 4 are incorrect.

A resolutive condition is present where the parties agree that their contractual obligations will operate fully, but that it will come to an end if an uncertain future event does or does not happen. See Hutchison & Pretorius (eds) *The Law of Contract in South Africa* 3rd ed (Oxford Cape Town 2017) 260. There is no resolutive condition in the agreement between Y and Z, relating to any uncertain event which may bring an end to their agreement. Although it is uncertain whether Y will decide to sell the leather couch, nevertheless if Y does decide to sell, the agreement between Y and Z will not automatically come to an end. It follows that option 5 is incorrect.

In a pre-emption agreement the prospective seller undertakes to give a prospective buyer preference in the event of deciding to sell the property (Eiselen et al *Study Guide* 34). Y granted Z such a right of pre-emption in their agreement. Accordingly, option 2 is correct. This also means that option 3 is incorrect, because a pre-emption contract was concluded.

Question 2

X sells his shop (a business) in a shopping mall to Y. During the negotiations X informs Y of the overhead costs of running the shop but fails to mention that the rental for the shop space is soon to escalate dramatically. In fact, the rent will be so high that the shop will scarcely be able to turn a profit. What cause of action will Y be able to rely on in the circumstances in order to claim damages?

1 Breach of contract.

2 Unjustified enrichment.

3 The reliance theory.

4 Material mistake.

5 Culpable misrepresentation. (1)

Answer

5.

Discussion

The failure by X to disclose that the rental for the shop space is soon to escalate dramatically can amount to a culpable misrepresentation by omission, which serves as an appropriate delictual cause of action to rely on, to claim damages. Even though a valid contract was concluded, the pre-contractual omission on the part of X allows for a delictual claim under these circumstances. Therefore option 5 is correct. See Hutchinson and Pretorius *Contract* 119-121, 129-135.

Y's mistake is only a mistake with regard to a characteristic of the business (an *error in substantia*), which is not a material mistake. This means that option 4 is incorrect. Nevertheless, the ruling in *Spenmac (Pty) Ltd v Tatrim CC* (2015 (3) SA 46 (SCA)) creates doubt as to whether an error relating to a characteristic of an object can be considered material, based on the facts of that case. In the end however, the Supreme Court of Appeal in that case ruled that the mistake related to the nature of the subject matter (*merx*). Therefore, to the court, it was an *error in corpore* which was material. See Hutchinson and Pretorius *Contract* 83-92.

Two applications of the reliance theory exist in South Africa, namely the direct approach, and the indirect approach. The direct approach is usually applied to prove that a contract was concluded, based on a reasonable belief instilled in the mind of the contract assertor, by the contract denier, when consensus between the parties is lacking. Here X and Y reached consensus for the sale of the business, and therefore a valid contract was concluded on this basis. Therefore, the direct approach does not apply. For the indirect approach to successfully apply, there must be a material and reasonable mistake present. As alluded to above, Y's mistake did not constitute a material mistake. But even if the mistake were considered material and reasonable, the contract between X and Y would be void, without any enforceable obligations arising between the parties. Consequently, a claim for damages would not succeed. And the question here requires you to consider a claim for damages. It follows that option 3 is incorrect. See Hutchinson and Pretorius *Contract* 94-111.

As alluded to above, a delictual cause of action is appropriate for Y to pursue. An unjustified enrichment claim will therefore not apply, and there is no evidence from the facts to indicate a breach of the sale contract. It follows that options 1 and 2 are incorrect.

Question 3

Cedric has joined a religious sect. Recently this sect took advantage of Cedric's good nature and convinced him to donate his motor vehicle to the sect, which Cedric did. Cedric approaches you for legal advice, explaining that he wants his motor vehicle returned to him. The issue emanating from these facts relates to

1 duress.

2 undue influence.

3 commercial bribery.

4 puffs.

5 *dicta et promissa*. (1)

Answer

2.

Discussion

You have to look what the requirements of each option are to answer this question. There was no actual violence or reasonable fear present and hence duress was not present (Hutchison and Pretorius *Contract* 141). It cannot be commercial bribery because there was no reward paid or promised (Hutchison and Pretorius *Contract* 147). It also cannot be puffing as there was no general praise or commendation (Hutchison and Pretorius *Contract* 123), nor a *dictum et promissum* as there was no material statement bearing on the quality of the thing sold (Hutchison and Pretorius *Contract* 123-124). The three requirements of undue influence are present: the sect obtained an influence over Cedric and used this in an unscrupulous manner to persuade him to donate his car to the sect to his detriment. This they seem to have accomplished by weakening his power of resistance and rendering his will compliant (Hutchison and Pretorius *Contract* 145-146).

Question 4

Assume the same facts as in question (6). A court presiding over this case is likely to find that the religious sect

1 threatened Cedric and more particularly his property.

2 instilled reasonable fear in Cedric.

3 coerced Cedric to donate his motor vehicle to the sect.

4 obtained an influence over Cedric, and that this influence weakened his powers of resistance and rendered his will compliant.

5 conducted itself in such a distasteful manner that it amounts to supervening impossibility of performance. (1)

Answer

4.

Discussion

This question also relates to the requirements of some of the options in the previous question, which were not applicable. And the conduct of the sect does not relate to supervening impossibility of performance, because performance has not become objectively or absolutely impossible. (Hutchison and Pretorius *Contract* 216). Option 4 is the only one that relates to undue influence and which a court is likely to find was present (Hutchison and Pretorius *Contract* 145-146).

Question 5

Y is a trusted employee of ABC Company and is able to influence the managing director of ABC Company. X bribes Y with R10 000 to influence the managing director to conclude a contract on behalf of ABC Company with X to the benefit of X. The contract between X and the ABC Company is

1 voidable at the instance of ABC company.

2 void.

3 valid, but unenforceable by X.

4 valid, but ABC Company may definitely claim contractual damages from X.

5 valid, but ABC Company may definitely claim delictual damages from X. (1)

Answer

1.

Discussion

In this case the requirements for commercial bribery can be proven from the facts. See Hutchinson and Pretorius *Contract* 147. Here, X is the briber and ABC Company is the principal, and in such a case, the contract is voidable at the instance of the principal (ABC Company). See Eiselen et al *Study Guide* 66-67. Accordingly, option 1 is the correct answer.

Question 6

Assume the same facts as in question 5. The agreement between X and Y is

1 voidable at the instance of X.

2 void.

3 valid, but unenforceable.

4 valid, but X may claim contractual damages from Y.

5 valid, but Y may claim delictual damages from X. (1)

Answer

2.

Discussion

As the requirements for commercial bribery are met, the agreement between the briber (X) and the agent (Y) is void for being illegal. See Eiselen et al *Study Guide* 67. Therefore option 2 is correct.

Question 7

X and Y conclude a contract, in terms of which X rents a house from Y for a period of six months. The contract is subject to a

1 suspensive condition.

2 resolutive condition.

3 suspensive time clause.

4 resolutive time clause.

5 modus. (1)

Answer

4.

Discussion

In this problem you are required to identify the applicable type of clause. The six month period is certain to lapse and come to an end. The question thus deals with an event or time that is certain to arise in the future. This means that a time clause is applicable. A time clause may be suspensive or resolutive. With a suspensive time clause, the operation of the relevant obligations under the contract are postponed. They become operational upon a certain future date or event. In this case, a suspensive time clause is not applicable because the obligations between X and Y have not been suspended to only become operational in six months time. It follows that option 3 is incorrect. With a resolutive time clause, the obligations terminate at a certain date or on the happening of a certain future event. In this case the obligations between

X and Y will terminate in six months time. Therefore, the applicable clause is a resolutive time clause, which is option 4. See Hutchison and Pretorius *Contract* 261-262.

A suspensive or resolutive condition relates to the happening of an uncertain future event, which is not the case in this question. Accordingly, options 1 and 2 are incorrect. See Hutchison and Pretorius *Contract* 260-261.

X or Y is not charged with a duty to do something in the future. Option 5 is thus incorrect as this is not a modus. See Hutchison and Pretorius *Contract* 262.

Question 8

X promises to give Y R10 000 if Y successfully climbs the Devils Tooth in the Drakensberg. This is an obligation subject to a

1 suspensive time clause.

2 resolutive time clause.

3 suspensive condition.

4 resolutive condition.

5 modus. (1)

Answer

3.

Discussion

The obligation is subject to a suspensive condition, as the obligation to pay R10 000 is suspended and only becomes enforceable if Y successfully climbs Devils Tooth in the Drakensberg. This is an uncertain future event which may or may not occur. Option 3 is correct. See Hutchison and Pretorius *Contract* 260-261.

A resolutive condition is a condition on the fulfilment of which the contract (or obligation) ceases to exist, which is not applicable to this question which makes the R10 000 payable if the condition is fulfilled. Option 4 is incorrect. See Hutchison and Pretorius *Contract* 260-261.

A time clause is a contractual term that makes the existence of an obligation dependent on an event or time that is certain to arise in the future. Since this question relates to an uncertain future event, and not a certain future event, a time clause is not applicable to this question. Options 1 and 2 are incorrect. See Hutchison and Pretorius *Contract* 261-262.

A modus is a term that imposes a duty on the recipient of the performance to do something in the future. This is not relevant to this question, as nothing is imposed on Y to do in the future, if he fulfils the condition and receives the R10 000. See Hutchison and Pretorius *Contract* 262.

Question 9

X undertakes to donate R100 000 to Y on 5 December 2020. This donation is subject to a

1 suspensive condition.

2 resolutive condition.

3 modal clause (modus).

4 suspensive time clause.

5 the *exturpi* rule and *stipulatio alteri* (1)

Answer

4.

Discussion

Options 1 and 2 are incorrect, because X's obligation to donate R100 000 is not subject to the occurrence of an uncertain future event. See Hutchison and Pretorius *Contract* 260-261.

Option 3 is incorrect because there is no obligation in this case that charges Y with the duty to do something in the future, after receiving the donation. See Hutchison and Pretorius *Contract* 262.

Option 4 is correct because the future date that has been set for performance (5 December 2020) is certain to happen, and suspends performance until that time or date (5 December 2020. See Hutchison and Pretorius *Contract* 261-262.

Option 5 is incorrect because the *exturpi* rule relates to a contract which cannot be enforced due to it being an illegal agreement (Hutchison and Pretorius *Contract* 199), and *stipulatio alteri* pertains to a contract for the benefit of a third party who is not a party to a contract ((Hutchison and Pretorius *Contract* 237-240). Neither of which is applicable to this question.

Question 10

X and Y conclude a contract under circumstances wherein X threatened to assault Y's husband. This threat may be used to prove an element of

1 misrepresentation.

2 undue influence.

3 duress.

4 contractual illegality

5 material mistake. (1)

Answer

3.

Discussion

From the facts, it seems that Y consented to the contract through fear inspired by an illegitimate threat. It is this threat which seemed to induce Y to conclude the contract with X. A threat of this nature is usually central to proving the elements of a duress claim. Accordingly, option 3 is correct. See Hutchison and Pretorius *Contract* 140-145. The presence of this type of threat is not readily associated with all of the other options set out above.

2019
Semester 2

1.1 Assignment 01

Question

Read the judgments in *Bloom v American Swiss Watch Co* 1915 AD 100; *Laws v Rutherfurd* 1924 AD 261 and *The Fern Gold Mining Company v Tobias* (1889-1890) 3 SAR TS 134. Identify and read the relevant section(s) in the prescribed textbook. Read both. You can find judgments in conventional law libraries, online at the website of the Southern African Legal Information Institute (SAFLII) (www.saflii.org) or as an e-resource on the Unisa Library site (choose Juta Law Online Publications and then South African Law Reports). **Then use those authorities to answer** the following question:

In a cash-in-transit heist, a gang of robbers attacks a van of XYZ Security in broad daylight on 10 January and robs R3.5 million in cash. The next day, XYZ Security, a well-known security company offers a reward of R100 000 on the TV news to anyone who gives information to the police leading to the arrest of the robbers. H watches the news and notices that a reward is being offered. On 15 January, H provides the police with information, which leads to the arrest of the robbers that very night. On 16 January, XYZ Security withdraws the reward, which is reported on the TV news. H watches the news and notes the withdrawal of the reward. XYZ Security only hears on 17 January that H has provided the information to the police. XYZ refuses to pay H the reward. **Advise H fully. Substantiate your advice and refer to relevant case law.**

TOTAL ASSIGNMENT 01 [10]

Answer

In order to identify the law, which you should apply to the problem, you were asked to:

(1) read *Bloom v American Swiss Watch Co* 1915 AD 100, *Laws v Rutherford* 1924 AD 261 and *The Fern Gold Mining Company v Tobias* (1889-1890) 3 SAR TS 134; and

(2) identify the relevant section(s) in the prescribed textbook.

(1) Read three cases

In *Bloom v American Swiss Watch Co* 1915 AD 100, the American Swiss Watch Co offered a reward after a robbery at their shop for the giving of information to the police which lead to the arrest of the thieves and the recovery of the stolen goods. Bloom did so without knowing of the reward. He claimed the reward, but his claim was refused. On appeal,

the court held that the reward was an offer open to the public. It could be accepted by providing information to the police. Bloom, however had no intention of accepting the offer because he did not know of its existence when he gave the information to the police.

In *Laws v Rutherford* 1924 AD 261, R gave L an option to accept an offer within 3 months by written notice. L failed to notify R of his acceptance in the prescribed manner. The court found that no contract arose.

In *Fern Gold Mining Company v Tobias* (1889-1890) 3 SAR TS 134, it was held that an offer can be revoked at any time before acceptance and that acceptance must come to the notice of the offeree.

(2) Identify the relevant section in the textbook

If the "Table of Cases" is consulted at the end of Hutchison and Pretorius (eds) *The law of Contract in South Africa* 3rd ed (Oxford Cape Town 2017), you will find the pages where *Bloom*, *Laws* and *Tobias* are discussed in the textbook.

The first page on which *Bloom* appears in the text, is 54. The paragraph deals with rewards. It is mentioned that an advertised reward is an offer to the public. The offer is accepted by performing the required act and the reward must be certain. A discussion of the requirements of a valid offer and acceptance seems appropriate. The second page on which it is discussed in the text is 58 which deals with the requirement that the acceptance must be a conscious response to the offer. This is again an indication that the requirements for a valid acceptance is relevant.

Laws appears in footnote 50 on page 58 as authority for the requirement that the acceptance must be in the form prescribed by the offer.

Tobias appears in footnote 44 on page 56 as authority for the requirement that the revocation of an offer must come to the notice of the offeror. Revocation of the offer is thus also relevant.

The relevant sections of the textbook are pages 50– 54, 56 and 57-58 where the requirements of a valid offer, the revocation of an offer and the requirements for a valid acceptance of an offer are discussed.

Identifying the problem

First, we must determine whether the reward complies with the requirements for a valid offer. Then if it does, we must determine whether the offer has validly been revoked. Only if it has not been validly revoked, the question must be addressed whether the offer has been validly accepted.

Discussing the relevant law applicable to the problem *AND* applying the law to the facts of the problem

The offer of reward of XYZ Security complies with the requirements for a valid offer:

1 The offer was firm. An offer must be made with the intention that its acceptance will result in a binding contract (Hutchison and Pretorius (eds) *The law of Contract in South Africa* (Oxford Cape Town 2017) 50). In *Bloom v American Swiss Watch Co* 1915 AD 100 the American Swiss Watch Co offered a reward after a robbery at their shop for the giving of information to the police which would lead to the arrest of the thieves and the recovery of the stolen goods. Bloom did so without knowing of the reward. He claimed the reward, but his claim was refused. On appeal, the court held inter alia

that the reward was an offer open to the public. The offer of XYZ Security was on the news and was not a tentative statement.

2 The offer was complete. An offer must include all material terms of the proposed agreement and there cannot be additional matters that still have to be discussed before the agreement can take effect (Hutchison and Pretorius *Contract* 50). The offer contained all the material terms: provide information to the police leading to the arrest of the robbers in return for the reward of R100 000. The offer will be accepted by providing the required information.

3 The offer was clear and certain. An offer is sufficiently clear and certain if the mere answer of 'yes' by the addressee brings a valid contract into existence (Hutchison and Pretorius *Contract* 50). If the offer is unclear and cannot capture what the offeror has in mind, no acceptance of the offer can create a binding contract. The offer by XYZ Security was so clear that H as a member of the public could form a clear idea what XYZ Security had in mind: a reward of R100 000 was offered to any member public for the giving of information to the police leading to arrest of the robbers. The giving of the required information will also constitute acceptance of the offer. Furthermore, an offer such as a promise of reward can be validly directed at undefined persons (the public).

The next issue is whether XYZ Security validly revoked their offer (Hutchison and Pretorius *Contract* 56). XYZ Security did not promise not to revoke their offer and they could revoke their offer at any time. It is clear from *Fern Gold Mining Company v Tobias* (1889-1890) 3 SAR TS 134, that an offer can be validly revoked at any time before acceptance, and that acceptance must come to the notice of the offeree. On 16 January the offer was revoked and came to H's notice, but for such revocation to be valid, it must have transpired before acceptance.

The question which now arises is whether H validly accepted the offer of reward, and if so, what was the date of the acceptance? The requirements of a valid acceptance have been met:

1 The acceptance must be unqualified. The acceptance is complete and unequivocal, where the entire offer and nothing additional or less is accepted (Hutchison and Pretorius *Contract* 57). H accepted the offer by providing the required information.

2 The acceptance must be by the person to whom the offer was made. Only the offeree can validly accept the offer (*Bird v Sumerville* 1961 (3) SA 194 (A). The general rule is that an offer should be addressed to a specific person, but an offer may also validly be directed to the public, such as an offer of a reward (*Bloom v American Swiss Watch Co* 1915 AD 100). The offer was directed at H as a member of the public and could be validly accepted by him.

3 The acceptance must be a conscious response to the offer. In *Bloom v American Swiss Watch Co* 1915 AD 100 the American Swiss Watch Co the court also held on appeal that that Bloom had no intention of accepting the offer because he did not know of its existence when he gave the information to the police. In our problem H, however, knew of the offer by XYZ Security and consciously responded to the offer by providing the required information to the police.

4 The acceptance must be in the form prescribed by the offeror (if any). The offeror can prescribe any method of acceptance he or she sees fit (*Carlill v Carbolic Smoke Ball Co* (1893) 1 QB 256; *Bloom v American Swiss Watch Co* 1915 AD 100). In *Laws v Rutherford* 1924 AD 261, R gave L an option to accept an offer within 3 months by written notice. L failed to notify R of his acceptance in the prescribed manner. The court therefore found that no contract arose. By giving the police information leading to the arrest of the robbers, H's acceptance complied with the prescribed mode of acceptance of XYZ Security. There was no need for the acceptance to come to the notice of XYZ Security. The prescribed mode of acceptance was complied with on 15 January when H provided the information to the police which led to relevant the arrests.

The revocation of the offer on 16 January, which also came to H's notice on this date was therefore not valid, as a valid acceptance was already in place on 15 January.

The giving of appropriate advice

A valid contract thus arose between H and XYZ Security on 15 January. Therefore H is entitled to the R100 000 reward.

Total: [10]

1.2 Assignment 02

Question 1

Which statement is **INCORRECT**?

1 A contract can be a bilateral juristic act.

2 A contract entails promises or undertakings on one or both sides.

3 An undertaking in a contract that a certain state of affairs exists, or has existed, is known as a warranty.

4 The conclusion of a contract can never be multilateral.

5 Freedom of contract means that the parties can agree to anything that is possible and lawful. (1)

Answer

4.

Discussion

The question deals with the characteristic features of a contract. See Hutchison & Pretorius (eds) *The Law of Contract in South Africa* 3rd ed (Oxford Cape Town 2017) 7. A contract is a juristic act. Option 4 is the only incorrect option. This option is incorrect because a contract can be concluded between many parties, therefore multilateral contracts are allowed under South African law. There should be at least two parties to an agreement, which means there can be a bilateral juristic act for the formation of a contract (Option 1). A contract entails promises or undertakings to perform on one or both sides, for instance a contract of donation requires that only one party to perform in accordance with the donation promised, whereas usually contracts are reciprocal in nature whereby one party promises to perform in exchange for the other party's promise of some other performance as well (Option 2). Option 3 is correct, and an example of a

warranty would be the reference to the make and year of a car model that is the subject matter of a possible sale. So as long as there is consensus between the parties, our law allows the party's the freedom to contract on anything, subject to the qualification that it must be possible and lawful (Option 5).

Question 2

X buys Y's car for R50 000. X pays the purchase price and Y delivers the car to X. Y has the intention to transfer ownership and X the intention to receive ownership. What type of agreement(s) did X and Y conclude when Y delivered the car to X?

1 A contract.

2 An agreement extinguishing a debt.

3 A real agreement.

4 Option 1, 2 and 3.

5 Option 2 and 3. (1)

Answer

5.

Discussion

The most important part of this question is to identify the type of agreement(s) that were concluded at the time when Y "delivered" the car to X. When the car was delivered by Y, the purchase price was paid, Y extinguished his debt or obligation (Option 2). This type of agreement concluded is an absolving agreement. Furthermore, when Y physically delivered the car, Y also mentally intended to transfer ownership of the car, and X mentally intended to acquire ownership rights. Accordingly, this is also a real or transfer agreement wherein rights were transferred (Option 3). Whilst a contract of sale was concluded between the parties, the sale was concluded before Y delivered the car, and not when the car was delivered. Thus, option 1 is incorrect. Because only options 2 and 3 are correct, this means that option 5 is the correct answer. See Hutchinson and Pretorius *Contract* 4-5.

Question 3

X makes an offer to sell her watch to Y for R2 500. X and Y agree on 15 May that X's offer will be open for acceptance until 31 May. On 20 May X informs Y in writing that she (X) intends to sell the watch to Z on 30 May. On 21 May Y informs X that she (Y) accepts the offer, but X refuses to sell the watch to her (Y). Y wants to compel X to sell the watch to her. How would you best advise Y?

1 Cancel the contract and seek to interdict X from selling the watch to Z.

2 Enforce the contract and seek to interdict X from selling the watch to Z.

3 Cancel the contract and seek an order for specific performance against X.

4 Enforce the contract and cancel the contract simultaneously through the use of an interdict.

5 Cancel the pre-emption agreement between X and Z. (1)

Answer

2.

Discussion

This question deals with an option agreement, and the applicable remedy available when there has been a breach of such an agreement. An option is a contract to keep an offer open for acceptance for a certain period of time ((Eiselen GTS et al *Law of contract. Only study guide for PVL3702* (University of South Africa 2016) 29-31). In this problem we have the parties agreeing to keep the offer open for acceptance to sell a watch, for a certain period. It is thus an option agreement, and the courts have held (Study Guide 30), that where there is an option, the substantive offer cannot be validly revoked before it is accepted (which in this case was timeously exercised by Y, prior to 31 May). With an option, the parties agree that the offeror (X) will not prematurely revoke the offer, either expressly or by implication, for example by offering to sell the same thing to a third party (Study Guide 29). In this case, X wants to revoke the offer by intending to sell the watch to Z, thereby breaching the agreement, which means that Y has the normal contractual remedies available to him to pursue for breach of contract (Study Guide 30). Because Y has exercised the option timeously, and now seeks to compel X to sell the watch to her, Y can enforce the contract, and interdict X from selling the watch to Z (Study Guide 30). Therefore option 2 is correct.

As Y wants to enforce the contract in order to purchase the watch, cancelling the contract is not a suitable remedy to pursue. Options 1, 3, 4 and 5 are thus incorrect. Furthermore, regarding option 5, a pre-emption agreement is concluded when a prospective seller agrees with a prospective purchaser to give the latter preference if the former should decide to sell (Study Guide 34-36). From the facts, this type of agreement is not present, therefore option 5 is incorrect for this reason as well.

Question 4

X and Y conclude a contract. When will their contract be **VOID**?

1 The conclusion of the contract is expressly prohibited by legislation as a crime.

2 X operates under an error in motive.

3 X threatens to kill Y if she does not conclude the contract.

4 X made an intentional misrepresentation to Y before the conclusion of the contract.

5 X made a *dictum et promissum* to Y before the conclusion of the contract. (1)

Answer

1.

Discussion

Option 1 is correct because an illegal contract which by statute constitutes a crime, is void. For instance, a contract for the sale of drugs which is illegal and prohibited by statute, will be void. A consequence of a void contract due to illegality is that the contract cannot be enforced (the *ex turpi* rule). See Hutchinson and Pretorius *Contract* 181-182, 187-190, 199.

An error in motive does not affect the validity of a contract. It relates to the motive or reason for a party entering into a contract, and is considered a non-material mistake, which does not impact on the consensus reached between the parties. It follows that it cannot render a contract void. Thus, option 2 is incorrect. See Hutchinson and Pretorius *Contract* 89, 114.

The threat to kill someone if that person does not conclude a contract relates to obtaining consensus improperly. Such a threat pertains to a requirement which must be proved to establish duress. Where all the requirements for duress are present, the contract becomes voidable, but not void. A voidable contract entitles the relevant party to set aside the contract, or to continue with the enforcement of the contract. Therefore option 3 is incorrect. See Hutchinson and Pretorius *Contract* 118, 140-145.

An intentional misrepresentation is also another form of obtaining consensus improperly in order to conclude a contract. Hereto, if the requirements for such a misrepresentation are satisfied, the contract which was concluded based on this misrepresentation, becomes voidable, but not void. Option 4 is thus incorrect. See Hutchinson and Pretorius *Contract* 118, 120-121, 129-133.

Option 5 is also incorrect. A *dictum et promissum* is a material statement made by one party (the seller) to the other party (the buyer) during their negotiations, pertaining to the quality of the relevant item or goods, which goes beyond mere praise and commendation. Where such a statement is made and shown to be unfounded, the purchaser may cancel the contract, or sue for a reduction of the purchase price. As such, it follows that such a contract is not void. See Hutchinson and Pretorius *Contract* 123-124.

Question 5

Liability for which form of misrepresentation may **NOT** be contractually excluded?

1 An innocent misrepresentation.

2 A negligent misrepresentation.

3 A grossly negligent misrepresentation.

4 A fraudulent misrepresentation.

5 A *dictum et promissum*. (1)

Answer

4.

Discussion

Liability for all the above options can be contractually excluded, except for a fraudulent misrepresentation. Option 4 is thus correct. See Hutchinson and Pretorius *Contract* 125.

Question 6

X and Y agree that should X sell her car, she (X) will offer to sell it to Y first, before making an offer to sell the car to any other person. X sells the car to Z for R50 000 without first offering it to Y for sale. Delivery of the car has not yet taken place. Which statement is **INCORRECT**?

1 X gave Y an option to purchase her (X's) car.

2 X gave Y a right of pre-emption with regard to her (X's) car.

3 Y can step into the shoes of Z with a unilateral declaration of intent.

4 Both Y and Z only have personal rights against X.

5 The personal right of Y enjoys preference above the personal right of Z. (1)

Answer

1.

Discussion

An option is a contract to keep an offer open for acceptance for a certain period of time. Clearly X and Y did not conclude such an agreement relating to the car. Option 1 is thus incorrect. See Study Guide 26.

A right of pre-emption occurs when a prospective seller agrees with a prospective purchaser to give the latter preference if the former should decide to sell (Study Guide 34-36). X contractually granted Y such a right of pre-emption. This means that option 2 is correct.

Because X concluded a contract of sale with Z, contrary to the pre-emptive right that was granted to Y contractually, Y can step into the shoes of Z with a unilateral declaration of intent. Consequently, it would be deemed that a contract of sale was concluded between X and Y. This can only transpire because Z has not yet taken delivery of the car, and accordingly did not become the owner of the car. It follows that option 3 is correct. See Study Guide 36.

As Z has not yet acquired ownership rights over the car, Z only has a personal right over X for the delivery of the car, stemming from the sale contract they concluded. Y also has a personal right (the pre-emptive right) over X which was created by the pre-emption agreement that was concluded between them. Z would have only had a real right over X, if he had taken delivery of the car, and he would have enjoyed the protection of this right, provided that he (Z) did not know of the existence of the pre-emptive right. Option 4 is thus correct. See Study Guide 36.

Whilst both Y and Z both have personal rights over Z, in this scenario Y's right enjoys preference as Y can step into the shoes of Z with a unilateral declaration of intent, as discussed above. Therefore option 5 is correct.

Question 7

Which of the following must a party prove who seeks to set a contract aside on the ground of undue influence?

1 The other party obtained influence over her.

2 The other party exercised this influence over her, in an unscrupulous manner in order to induce her to consent to a transaction which is to her detriment and which she, with a normal free will, would not have concluded.

3 The other party gained his influence over her by standing in a close relationship to her.

4 Options 1 and 2.

5 Options 1, 2 and 3. (1)

Answer

4.

Discussion

Option 3 is incorrect because even though in most instances of undue influence, there is a close relationship between the parties, such a relationship is not one of the requirements the party seeking to set aside the contract needs to prove. Nevertheless, a relationship of this nature may assist in proving the requirements for undue influence. See Hutchison and Pretorius *Contract* 145-146. It follows that if option 3 is incorrect, then option 5 will also be incorrect.

Options 1 and 2 are correct because they are applicable requirements that must be proved to set a contract aside on the ground of undue influence. See Hutchison and Pretorius *Contract* 145-146. Since options 1 and 2 are correct, it follows that option 4 is the correct answer.

Question 8

X sells his car to Y for R50 000 and undertakes to deliver the car to Y tomorrow morning. The obligation to deliver the car tomorrow is subject to a

1 suspensive condition.

2 resolutive condition.

3 suspensive time clause.

4 resolutive time clause.

5 *modus*. (1)

Answer

3.

Discussion

Option 1 is incorrect, because X's obligation to deliver the car to Y tomorrow morning is not subject to the occurrence of an uncertain future event (Hutchison and Pretorius *Contract* 260).

Option 2 is incorrect because there is no term in X and Y's agreement that determines that the performances come to an end if an uncertain future event does or does not occur (Hutchison and Pretorius *Contract* 260).

Option 3 is correct because the future date that has been set for performance (delivery of the car to Y tomorrow morning) is certain to happen and suspends performance until that time or date (tomorrow morning) (Hutchison and Pretorius *Contract* 261-262).

Option 4 is incorrect because X and Y have not agreed that any obligations will terminate at a certain date or on the happening of a certain future event (Hutchison and Pretorius *Contract* 261-262).

Option 5 is incorrect because the obligation in this case does not charge Y with the duty to do something in the future (Hutchison and Pretorius *Contract* 262).

Question 9

X sells his car to Y for R50 000 if it rains in the Karoo next Monday. This is a contract of sale subject to a

1 suspensive condition.

2 resolutive condition.

3 suspensive time clause.

4 resolutive time clause.

5 *modus*. (1)

Answer

1.

Discussion

The correct answer is option 1. X's obligation to sell his car to Y for R50 000 is subject to the occurrence of an uncertain future event, if it rains in the Karoo next Monday. (Hutchison and Pretorius *Contract* 260).

Option 2 is incorrect because there is no term in X and Y's agreement that determines that the performances come to an end if an uncertain future event does or does not occur (Hutchison and Pretorius *Contract* 260).

Options 3 and 4 are both incorrect because there is no time clause in this scenario (Hutchison and Pretorius *Contract* 261-262). The next Monday determines when the suspensive condition has to be fulfilled.

Option 5 is incorrect because the obligation in this case does not charge Y with the duty to do something in the future (Hutchison and Pretorius *Contract* 262).

Question 10

Which one of the following statements regarding tacit terms is **INCORRECT**?

1 The courts often employ the officious bystander test in determining whether a contract contains a tacit term.
2 Tacit terms will only be read into a contract if they do not conflict with any of the unambiguous express terms of the contract.
3 Tacit terms will only be read into a contract if it is necessary in a business sense to give efficacy to the contract.
4 Tacit term must be capable of a clear and exact formulation.
5 Tacit terms are the *naturalia* of the contract. (1)

Answer

5.

Discussion

Option 5 is incorrect. *Naturalia* are terms automatically included in any contract and are therefore implied by law (*ex lege*). In this sense, generally where the parties have not agreed to exclude *naturalia*, the law reads into the contract the applicable *naturalia*, which becomes enforceable between the parties (Hutchison and Pretorius *Contract* 247). Whereas tacit terms are those that the parties did not specifically agree upon, but which (without saying anything) both parties expected to form part of their agreement. Therefore, a tacit term is not a term that is automatically read into the contract *ex lege* (*naturalia*), instead it is a term which the parties are taken to have tacitly agreed to, when successfully applying the officious bystander test. See Hutchison and Pretorius *Contract* 257-258.

The rest of the options are correct. In this regard, see Hutchison and Pretorius *Contract* 257-258 for the discussion of tacit terms.

2019
Semester 1

1.1 Assignment 01

Question

Read the judgments in *Bloom v American Swiss Watch Co* 1915 AD 100; *Laws v Rutherford* 1924 AD 261 and *The Fern Gold Mining Company v Tobias* (1889-1890) 3 SAR TS 134. Identify and read the relevant section(s) in the prescribed textbook. You can find judgments in conventional law libraries, online at the website of the Southern African Legal Information Institute (SAFLII) (www.saflii.org) or as an e-resource on the Unisa Library site (choose Juta Law Online Publications and then South African Law Reports). Then use those cases and the textbook to answer the following question:

In a cash-in-transit heist, a gang of robbers attacks a van of XYZ Security in broad daylight on 10 January and robs R3.5 million in cash. The next day, XYZ Security, a well-known security company offers a reward of R100 000 on the TV news to anyone who gives information to the police leading to the arrest of the robbers. H watches the news and notices that a reward is being offered. On 14 January, XYZ Security withdraws the reward, which is reported on the TV news. H does not watch the news and fails to hear about the revocation of the reward. On 15 January, H provides the police with information, which indeed leads to the arrest of the robbers that very night. On 17 January, XYZ Security hears that the information has been provided to the police. XYZ refuses to pay H the reward. Advise H fully. Substantiate your advice and refer to relevant case law.

Answer

In order to identify the law, which you should apply to the problem, you were asked to:

(1) read *Bloom v American Swiss Watch Co* 1915 AD 100, *Laws v Rutherford* 1924 AD 261 and *The Fern Gold Mining Company v Tobias* (1889-1890) 3 SAR TS 134; and

(2) identify the relevant section(s) in the prescribed textbook.

(1) Read three cases

In *Bloom v American Swiss Watch Co* 1915 AD 100 the American Swiss Watch Co offered a reward after a robbery at their shop for the giving of information to the police which lead to the arrest of the thieves and the recovery of the stolen goods. Bloom did so without knowing of the reward. He claimed the reward, but his claim was refused. On appeal, the court held that the reward was an offer open to the public. It could be accepted by providing information to the police. Bloom, however had no intention of accepting the offer because he did not know of its existence when he gave the information to the police.In *Laws v Rutherford* 1924 AD 261 R gave L an option to accept an offer within 3 monthsby written notice. L failed to notify R of his acceptance in the prescribed manner. The court found that no contract arose.

In *Fern Gold Mining Company v Tobias* (1889-1890) 3 SAR TS 134 it was held that an offer can be revoked at any time before acceptance and that acceptance must come to the notice of the offeree.

(2) Identify the relevant section in the textbook

If the "Table of Cases" is consulted at the end of Hutchison and Pretorius (eds) *The law of Contract in South Africa* 3rd ed (Oxford Cape Town 2017) you will find the pages where *Bloom*, *Laws* and *Tobias* are discussed in the textbook.

The first page on which *Bloom* appears in the text, is 54. The paragraph deals with rewards. It is mentioned that an advertised reward is an offer to the public. The offer is accepted by performing the required act and the reward must be certain. A discussion of the requirements of a valid offer and acceptance seems appropriate. The second page on which it is discussed in the text is 58 which deals with the requirement that the acceptance must be a conscious response to the offer. This is again an indication that the requirements for a valid acceptance is relevant.

Laws appears in footnote 50 on page 58 as authority for the requirement that the acceptance must be in the form prescribed by the offer.

Tobias appears in footnote 44 on page 56 as authority for the requirement that the revocation of an offer must come to the notice of the offeror. Revocation of the offer is thus also relevant.

The relevant sections of the textbook are page 50– 54, 56 and 57-58 where the requirements of a valid offer, the revocation of an offer and the requirements for a valid acceptance of an offer are discussed.

Identifying the problem

First, we must determine whether the reward complies with the requirements for a valid offer. Then if it does, we must determine whether the offer has validly been revoked. Only if it has not been validly revoked, the question must be addressed whether the offer has been validly accepted.

Discussing the relevant law applicable to the problem *AND* applying the law to the facts of the problem

The offer of reward of XYZ Security complies with the requirements for a valid offer:

1 The offer was firm. An offer must be made with the intention that its acceptance will result in a binding contract (Hutchison and Pretorius (eds) *The law of Contract in South Africa* (Oxford Cape Town 2017) 50). In *Bloom v American Swiss Watch Co* 1915 AD 100 the American Swiss Watch Co offered a reward after a robbery at their shop for the giving of information to the police which would lead to the arrest of the thieves and the recovery of the stolen goods. Bloom did so without knowing of the reward. He claimed the reward, but his claim was refused. On appeal, the court held inter alia

2 The offer was complete. An offer must include all material terms of the proposed agreement and there cannot be additional matters that still have to be discussed before the agreement can take effect (Hutchison and Pretorius *Contract* 50). The offer contained all the material terms: provide information to the police leading to the arrest of the robbers in return for the reward of R100 000. The offer will be accepted by providing the required information.

3 The offer was clear and certain. An offer is sufficiently clear and certain if the mere answer of 'yes' by the addressee brings a valid contract into existence (Hutchison and Pretorius *Contract* 50). If the offer is unclear and cannot capture what the offeror has in mind, no acceptance of the offer can create a binding contract. The offer by XYZ Security was so clear that H as a member of the public could form a clear idea what XYZ Security had in mind: a reward of R100 000 was offered to any member public for the giving of information to the police leading to arrest of the robbers. The giving of the required information will also constitute acceptance of the offer. Furthermore, an offer such as a promise of reward can be validly directed at undefined persons (the public).

The next question is whether XYZ Security validly revoked their offer (Hutchison and Pretorius *Contract* 56). XYZ Security did not promise not to revoke their offer and they could revoke their offer at any time. It is clear from *Fern Gold Mining Company v Tobias* (1889-1890) 3 SAR TS 134 that an offer can be revoked at any time before acceptance, but acceptance must come to the notice of the offeree. The revocation of the reward on 14 January did not come to H notice and therefore did not take effect against H.

The question now arises whether H validly accepted the offer of reward. The requirements of a valid acceptance have been met:

1 The acceptance must be unqualified. The acceptance is complete and unequivocal, where the entire offer and nothing additional or less is accepted (Hutchison and Pretorius *Contract* 57). H accepted the offer by providing the required information.

2 The acceptance must be by the person to whom the offer was made. Only the offeree can validly accept the offer (*Bird v Sumerville* 1961 (3) SA 194 (A). The general rule is that an offer should be addressed to a specific person, but an offer may also validly be directed to the public, such as an offer of a reward (*Bloom v American Swiss Watch Co* 1915 AD 100). The offer was directed at H as a member of the public and could be validly accepted by him.

3 The acceptance must be a conscious response to the offer. In *Bloom v American Swiss Watch Co* 1915 AD 100 the American Swiss Watch Co the court also held on appeal that that Bloom had no intention of accepting the offer because he did not know of its existence when he gave the information to the police. In our problem H, however, knew of the offer by XYZ Security and consciously responded to the offer by providing the required information to the police.

4 The acceptance must be in the form prescribed by the offeror (if any). The offeror can prescribe any method of acceptance he or she sees fit (*Carlill v Carbolic Smoke Ball Co* (1893) 1 QB 256; *Bloom v American Swiss Watch Co* 1915 AD 100). In *Laws v Rutherford* 1924 AD 261 R gave L an option to accept an offer within 3 months by written notice. L failed to notify R of his acceptance in the prescribed manner. The

court therefore found that no contract arose. By giving the police information leading to the arrest of the robbers, H's acceptance complied with the prescribed mode of acceptance of XYZ Security. There was no need for the acceptance to come to the notice of XYZ Security.

The giving of appropriate advice

A valid contract thus arose between H and XYZ Security on 15 January.

1.2 Assignment 02

Question 1

An absolving agreement is an agreement

1 only creating obligations.

2 whereby a right is transferred.

3 an example of which is cession.

4 extinguishing or discharging obligations.

5 that cannot entail the transfer of ownership of property. (1)

Answer

4.

Discussion

Option 1, 2 and 4 are descriptions of legally binding agreements. See Hutchison & Pretorius (eds) *The Law of Contract in South Africa* 3rd ed (Oxford Cape Town 2017) 4-5; Eiselen GTS et al *Law of contract. Only study guide for PVL3702* (University of South Africa 2016) 3. Option 1 is the description of obligationary agreements, option 2 of real agreements and option 4 of absolving agreements. Cession is an example of a real agreement and not an absolving agreement (option 3). An absolving agreement can entail the transfer of ownership of property (option 5).

Question 2

Which statement relating to the Bill of Rights in the Constitution of the Republic of South Africa, 1996, is **CORRECT?**

1 Vertical application relates to relationships between private persons, as in most contractual situations.

2 Horizontal application relates to relationships between the state and the individual.

3 In *Barkhuizen v Napier* 2007 (5) SA 323 (CC), the majority in the Constitutional Court ruled that a contractual term can be tested directly against a provision in the Bill of Rights.

4 In *Barkhuizen v Napier* 2007 (5) SA 323 (CC), the minority in the Constitutional Court preferred an indirect application of the Constitution to the contractual dispute before them.

5 In *Barkhuizen v Napier* 2007 (5) SA 323 (CC), Ngcobo J reasoned that the proper approach to constitutional challenges to contractual terms, is to determine whether the term challenged is contrary to public policy; and what constitutes public policy must be discerned with reference to the fundamental values embodied in the Constitution. (1)

Answer

5.

Discussion

Option 1 and 2 are incorrect, because the relationship between the state and the individual is vertical, whereas the relationship between private persons is horizontal. Option 3 and 4 are also incorrect. In *Barkhuizen v Napier* 2007 (5) SA 323 (CC) the majority in the Constitutional Court preferred an indirect application of the Constitution to the contractual dispute before them, but the minority ruled that a contractual term can be tested directly against a provision in the Bill of Rights. Option 5 is correct. See Hutchison and Pretorius *Contract* 37 40.

Question 3

The auction of a Porsche Carrera (a type of sports car) is advertised in the newspaper: The auction is to take place on 1 May. On 1 May X, the auctioneer, announces before the start of the auction that the auction will be subject to reserve and that the successful bidder must pay the price cash on delivery. Y is the highest bidder. Which statement is **INCORRECT**?

1 X may validly call off the auction any time before the start of the auction on 1 May.

2 Y is not bound by the condition that the successful bidder must pay the price cash on delivery because this condition has not been announced in the advertisement.

3 X may not change the conditions of the auction after the first *bona fide* bid has been made.

4 Y may retract his bid before the hammer falls, because Y makes an offer to buy the car by bidding.

5 X may refuse to accept Y's offer if Y's bid is lower than the reserve price. (1)

Answer

2.

Discussion

The facts of this problem indicate that we are dealing with an auction subject to conditions and its legal consequences. See in this regard Hutchison and Pretorius *Contract* 55-56. All the options are correct except option 2. Y is bound.

Question 4

X makes an offer to sell her watch to Y for R2 500. X and Y agree on 15 May that X's offer will be open for acceptance until 31 May. On 20 May X informs Y in writing that she (X) intends to sell the watch to Z on 30 May. On 21 May Y informs X that she (Y) accepts the offer, but X refuses to sell the watch to her (Y). Which statement is **CORRECT?**

1 X and Y concluded a pre-emption contract on 15 May.

2 X and Y concluded a pre-emption contract and an option contract on 15 May.

3 X and Y concluded a pre-emption contract on 21 May.

4 X and Y concluded an option contract on 21 May.

5 X and Y concluded an option contract on 15 May. (1)

Answer

5.

Discussion

All the options to this question relate to the question whether the parties have concluded an option or a pre-emption contract and on what date. See Study Guide 28-36.

An option involves a substantial offer kept open by an agreement. A pre-emption involves an undertaking by the one party to give preference to the other party if the first party wants to sell. In this problem we have he parties agreeing to keep the offer to sell a watch open for a certain period. It thus is an option. Options 1,2 and 3 are thus incorrect. That leaves options 4 and 5 as possibilities. The agreement not to sell was concluded on 15 May and exercised on 21 May. Option 4 is thus incorrect.

Question 5

The notion that contracts are based on the concurring declaration of the parties, has given rise to which theory?

1 The expedition theory.

2 The declaration theory.

3 The reliance theory.

4 The reception theory.

5 The will theory. (1)

Answer

2.

Discussion

All the options relate to the theories of contract explaining the basis of contractual liability. See Hutchison and Pretorius *Contract* 15-17. The question is to which theory does the description in the body of the question belong? The answer is option 2.

Question 6

In which instance has consensus been obtained improperly?

1 A common error.

2 Rectification.

3 An *error in negotio*.

4 A negligent misrepresentation.

5 A threat that is not related to an imminent or inevitable evil. (1)

Answer

4.

Discussion

Improperly obtained consensus is discussed in chapter 4 of Hutchison and Pretorius *Contract*.

Option 1, 2 and 3 do not relate to improperly obtained consensus.

The common error in option 1 is an error shared by the parties. Consensus exists, but the contract is void. It thus does not relate to improperly obtained consensus. See Hutchison and Pretorius *Contract* 111-112.

Misrepresentation (which included negligent misrepresentation) is an instance of improperly obtained consensus (Hutchison and Pretorius *Contract* 121). This option is thus correct.

Although duress is an instance of improperly obtained consensus, option 5 is incorrect because it is an incorrect statement of one of the requirements of duress (Hutchison and Pretorius *Contract* 141).

Question 7

S illegally sells uncut diamonds to P for R10 000. Both S and P know that the selling of uncut diamonds is prohibited by statute. Although S delivers the diamonds to P, P fails to pay the purchase price. Which statement is **CORRECT**?

1 S will be able to claim the purchase price from P.

2 The contract sale is void because of illegality.

3 The contract of sale is voidable because of illegality.

4 S shall be able to claim return of the diamonds from P with an enrichment action, because the court as a rule will relax the *par delictum* rule.

5 S shall be able to claim return of the diamonds from P with an enrichment action because the *par delictum* rule does not apply in the circumstances. (1)

Answer

2.

Discussion

This question relates to the legal consequences of an illegal contract which has been partially performed. See Hutchison and Pretorius *Contract* 199-201. Such a contract is void. Option 1 and 3 are thus incorrect. A void contract cannot be enforced. Option 2 is thus correct.

Option 4 and 5 relate to the question what the remedies are where the party/parties have performed in terms of such a void contract. The *par delictum* rule will apply in this problem because both parties know that the selling of uncut diamonds are prohibited. Option 4 is thus incorrect. The *par delictum* rule will not be relaxed as a rule and thus option 4 is incorrect.

Question 8

X rents a house from Y for R10 000 per month until such time as his employer transfers him to Cape Town. The lease is subject to a

1 suspensive time clause.

2 resolutive time clause.

3 suspensive condition.

4 resolutive condition.

5 *modus*. (1)

Answer

4.

Discussion

In this problem you are required to identify the type of clause. The transfer of X is not an event which is certain to happen in future and this clause thus cannot be a time clause (Hutchison and Pretorius *Contract* 261). Option 1 and 2 is thus not correct.

It is uncertain when and whether X will be transferred which indicates that this clause must be a condition (Hutchison and Pretorius *Contract* 259). This leaves us with option 3 and 4. In this problem the lease is fully operative from the date of conclusion of the contract until the occurrence of an uncertain future event when the contract comes to an end. This clause is thus a resolutive condition (Hutchison and Pretorius *Contract* 260). Option 3 is thus wrong and option 4 correct.

X or Y is not charged with a duty to do something in the future. The lease could possibly come to an end. Option 5 is thus incorrect as this is not a modus (Hutchison and Pretorius *Contract* 262).

Question 9

X donates R100 000 to the Salvation Army for the purpose of looking after homeless people. The obligation to pay R100 000 is subject to a

1 *modus*.
2 supposition.
3 suspensive condition.
4 resolutive condition.
5 positive condition. (1)

Answer

1.

Discussion

Homeless people are not party to this contract. Only X and the Salvation Army is. The Salvation Army is charged with the duty to use the R100 000 to look after homeless people in future and this duty is not owed to a party to the contract. This is exactly what a modal clause (*modus*) is (Hutchison and Pretorius *Contract* 262). Option 1 is thus correct.

The looking after homeless people is not an assumption or supposition that a certain state of affairs exists as it involves a duty and creates an obligation which the Salvation Army has to fulfil. It thus cannot be a supposition (Hutchison and Pretorius *Contract* 262) and option 2 is thus incorrect.

This clause furthermore does not make the performance of payment of R100 000 dependant on the occurrence of an uncertain future event (condition) (Hutchison and Pretorius *Contract* 259). Option 3, 4 and 5 is thus incorrect.

Question 10

A term implied *ex lege* into a contract

1 is imported into a contract by law and operates, unless the parties exclude it.
2 is imported into a contract by the parties and operates, unless the law operates to exclude it.
3 is also known as a *naturalium* (singular of *naturalia*) if it is implied by the common law.
4 is a tacit term.
5 option 1 and 3. (1)

Answer

5.

Discussion

The correct option(s) are supposed to relate to *ex lege* terms. See the discussion of these terms in Hutchison and Pretorius *Contract* 254-257. Option 1 and 3 are both correct and option 5 included both these options.

Option 2 describes all terms that are not illegal. Tacit terms are terms that the parties did not explicitly agree upon but which the parties expect to form part of their contract. Option 4 is thus incorrect.

2018
Semester 2

1.1 Assignment 01

Question

Read the judgment in *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303 (A). Identify the judgment of the Appellate Division case on which this judgement is based as well as the relevant section in the prescribed textbook. Read both. You can find judgments in conventional law libraries, online at the website of the Southern African Legal Information Institute (SAFLII) (www.saflii.org) or as an e-resource on the Unisa Library site (choose Juta Law Online Publications and then South African Law Reports). **Then use those authorities to answer** the following question:

John, a racehorse owner, advertises for sale the horse Fire for R1.5 million. In the advertisement it is stated that Fire is an offspring of the legendary July winner, Lightning. Peter is a horse breeder who specifically wishes to introduce the bloodline of Lightning into his stud. He agrees orally with John to buy Fire for R1.5 million. Later, in order to meet the requirements of the horse breeders' association, John has a written contract drawn up which Peter signs in John's presence without reading. The contract makes no mention of Fire's ancestry, but does contain a clause exempting John from liability for any representations made during negotiations or in the contract. Peter's attention is not drawn to the provisions of this clause. A month later Peter finds out that Fire is in fact not an offspring of Lightning, although at the time of the conclusion of the contract John genuinely and without any fault on his part believed that to be the case. Advise Peter on whether the contract of sale is valid. Substantiate your advice and refer to relevant case law. Do not apply the law with regard to misrepresentation or the Consumer Protection Act 68 of 2008 to this question. (10)

Answer

In order to identify the law, which you should apply to the problem, you were asked to:

(1) read the case of *Spindrifter* to identify the *ratio decidendi*:

(2) identify the Appellate Division case on which the *ratio decidendi* of *Steyn* was based;

(3) identify the relevant section(s) in the textbook; and

(4) not discuss misrepresentation.

(1) The *ratio decidendi of the Spindrifter* case

The court applied the *iustus error* approach to error and held that the error of the appellant was *iustus*. The respondent had a duty to direct the appellant's attention to the existence of a clause on the reverse of the form, and that her silence therefore amounted to an innocent misrepresentation 'as to the existence in the contract of a fundamental provision wholly at variance with and repugnant to the tenor of their negotiations up to that very moment' (316).

(2) Identify the AD case on which the *ratio decidendi* in *Spindrifter* was based

The court based its decision on two AD cases: *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) and *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 893 (A). Both cases applied the *iustus error* approach to error.

The court stated in *George* (471):

> "When can an *error* be said to be *justus* for the purpose of entitling a man to repudiate his apparent assent to a contractual term? As I read the decisions, our Courts, in applying the test, have taken into account the fact that there is another party involved and have considered his position. They have, in effect, said: Has the first party - the one who is trying to resile - been to blame in the sense that by his conduct he had led the other party, as a reasonable man, to believe that he was binding himself? …. If his mistake is due to a misrepresentation, whether innocent or fraudulent, by the other party, then, of course, it is the second party who is to blame and the first party is not bound."

Although the *Du Toit* case is in Afrikaans, it is clear from the English headnote that this case also dealt with *iustus error*.

(3) Identify the relevant section in the textbook

The relevant section in the textbook can be identified by consulting the "Table of cases" at the end of Hutchison and Pretorius (eds) *The law of Contract in South Africa* 3rd ed (2017) Oxford, Cape Town to find the pages where *George* and *Du Toit* are discussed in the textbook. One of the pages on which *George* is discussed is page 103. One of the pages where *Du Toit* is discussed is page 105. Both discussions fall within paragraph 3.6 on "The objective approach as qualified by the *iustus error* doctrine."

It is thus clear from the above that the objective approach of the courts (declaration theory as qualified by the *iustus error* doctrine should be applied to the assignment problem.

(4) Do not discuss misrepresentation

This misrepresentation that you must not discuss cannot be the same as the misrepresentation in the *iustus error* doctrine (the error will be reasonable (*iustus*) if the error was caused by a misrepresentation), because we know we have to base our answer on *George* and *Du Toit* which both deal with the *iustus error* doctrine.

So what does the instruction mean? In the given facts, Peter made an innocent misrepresentation with regard to Fire's lineage. This is thus the misrepresentation we need not discuss in so far it as it does not cause a material mistake.

Identifying the problem

The facts indicate that even though John and Peter have apparently reached consensus (there is a written contract) they may not have reached consensus based on the will theory. Peter signed the contract without reading it and thought the horse was an offspring of Lightning. The question thus deals with error.

The objective approach of the courts furthermore involves the application of the declaration theory as qualified by the *iustus error* doctrine (Hutchison and Pretorius *Contract* 101-106). The *iustus error* doctrine has two requirements: the mistake must be material (an application of the will theory) and reasonable (an indirect application of the reliance theory.

Discussing the relevant law applicable to the problem *AND* applying the law to the facts of the problem

John and Peter have reached consensus according to the declaration theory. There is a signed contract of sale, which indicates that their declared intentions have concurred. The *iustus error* doctrine now has to be applied because it qualifies the declaration theory. Peter erred with regard to Fire's lineage and the presence of the exemption clause in the written contract of sale. The question is thus whether these mistakes are material and reasonable in terms of *iustus error* doctrine.

In the present case the innocent misrepresentation regarding Fire's lineage causes a mistake regarding a characteristic (the lineage) of the thing sold, Fire (an *error in substantia*). There are two views on whether such a mistake is material (Hutchison and Pretorius *Contract* 90-92). The one view is that the mistake is not material (*Trollip v Jordaan* 1961 1 SA 238 (A); The other view is that such a mistake is material (*Spenmac (Pty) Ltd v Tatrim CC* 2015 3 SA 46 (SCA). The latter view cannot be correct as the parties wanted to buy and sell the same horse, Fire. This mistake is thus not material.

The parties were, however, not in agreement as to the legal consequences (obligations) they wished to create: Peter did not know that there was a clause in the contract he signed exempting John from liability for any representations made during negotiations or in the contract, but John knew that the sale included an exemption clause. This mistake is material and excludes *consensus* between the parties (Hutchison and Pretorius *Contract* 88). No contract thus arose on the basis of the will theory.

The facts of our problem are very similar to both the facts of *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303 (A) and *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 889 (A). In both cases, the contract denier signed an agreement without reading it. The contract in *Spindrifter* contained a clause allowing the contract enforcer to unilaterally change the date of an exhibition, which was contrary to the dates mentioned during the negotiations between the parties. The contract in *Du Toit* contained in a term excluding the contract enforcer's liability for misrepresentation. An advertisement contained an innocent misrepresentation regarding the thing sold. The court held in both cases that the mistake regarding the clause was material.

This type of mistake also occurred in other cases. In *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 (4) SA 164 (D) the plaintiff believed that he was purchasing the erf shown to him by the seller's agent, while the written contract that he signed indicated the correct erf which was a completely different property. His mistake related to performance and was material. In *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (2) SA 234 (A) the appellant erred with regard the period of the lease which was an aspect of the performance.

However, the matter does not end here, because Peter still has to prove that his mistake was reasonable. This aspect of *iustus error* is an indirect application of the reliance theory. A mistake will inter alia be reasonable (Hutchison and Pretorius *Contract* 104-106) where the mistake was caused by a misrepresentation on the part of the contract assertor (John). Fault is not a requirement for this misrepresentation, but wrongfulness is. Such an omission will only be wrongful if John (the contract enforcer) had a legal duty in the circumstances to speak and to remove the incorrect impression. Such a duty will exist where the contract assertor, before the conclusion of the contract, created an impression that is in direct conflict with the agreement he or she seeks to enforce (Hutchison and Pretorius *Contract* 104-105). Under these circumstances, the contract assertor must draw the contract denier's attention to this discrepancy (Hutchison and Pretorius *Contract* 104-105).

In *Spindrifter* the Appellate Division held that the contract enforcer had a duty to inform the contract denier of the existence of a clause allowing the contract enforcer to unilaterally change the date of the exhibition for two reasons (317-318). The basis of the negotiations up to the time of signature was that the exhibition would take place on certain dates and the contract enforcer had no reason to believe that the contract denier would have signed the contract if it knew of the existence of such a clause. The Appellate Division in *Du Toit* reasoned (906) that by not saying anything about the exemption clause, the contract assertor created the impression that the signed document did not negate the advertisement. The contract assertor misled the contract denier regarding the contents of the contractual document by way of omission, which rendered the contract denier's mistake reasonable.

John made an innocent misrepresentation by remaining silent because he had a duty to bring the existence of the exemption clause to Peter's attention for the clause negated the advertisement. It could also be argued that John had such a duty because the written sale amended the oral sale by adding the exemption clause. Peter's mistake was thus reasonable and there was no apparent consensus.

The giving of appropriate advice

The written contract of sale is invalid because Peter's mistake was both material and reasonable and both actual and apparent consensus was lacking

Assignment 02

Question 1

Which obligations have **NO** legal consequences?

1 Civil obligations.

2 Natural obligations.

3 Facultative obligations.

4 Moral obligations.

5 Alternative obligations. (1)

Answer

4.

Discussion

Option 4 is correct because moral obligations are not regarded as legal obligations, and they have no legal consequences at all. The others options all have legal consequences. See Hutchison & Pretorius (eds) *The Law of Contract in South Africa* 3rd ed (Oxford, Cape Town 2017) 244-245; Eiselen GTS et al *Law of contract. Only study guide for PVL3702* (University of South Africa 2016) 94.

Question 2

Which cause(s) of action may render the contract voidable?

1 A *dictum et promissum*.

2 Illegality.

3 Supervening impossibility of performance.

4 Innocent misrepresentation.

5 Options 1 and 4. (1)

Answer

5.

Discussion

Option 1 is correct because a *dictum et promissum* renders a contract voidable (Hutchison and Pretorius *Contract* 123-124). Option 4 is also correct because innocent misrepresentation is a form of improperly obtained consensus and renders the contract voidable and not void (Hutchison and Pretorius *Contract* 118; Study Guide 53).

Option 2 is not correct because illegality causes the contract to be void or unenforceable (Hutchison and Pretorius *Contract* 6 and 181-182; Study Guide 72). Option 3 is also incorrect because supervening impossibility of performance extinguishes the obligation (Hutchison and Pretorius *Contract* 216 395).

Question 3

Generally, an offer of reward is

1 an offer to the public.

2 an invitation to do business.

3 an offer directed at specified persons.

4 an offer directed at unspecified persons.

5 1 and 4. (1)

Answer

5.

Discussion

An offer of reward is regarded as an offer directed to the public or to unspecified persons (*Carlill v Carbolic Smoke Balls Co* [1893] 1 QB 256; *Bloom v American Swiss Watch Co* 1915 AD 100; Hutchison and Pretorius *Contract* 52 and 54). Options 1 and 4 is thus correct.

Option 2 is incorrect, because an advertisement, which is not a reward, is usually only an offer to do business (Hutchison and Pretorius *Contract* 53). An offer of reward is not directed as specified persons (Hutchison and Pretorius *Contract* 52). Option 3 is thus incorrect.

Question 4

Generally, where is the place of formation of a contract?

1 Where the offeree decides to accept the offer.

2 Where the last act necessary to constitute the agreement is formed.

3 Where the offeree posts his acceptance.

4 Where the offeree prepares to perform in terms of the contract.

5 Where the offeror learns of the acceptance. (1)

Answer

5.

Discussion

The information theory is the general rule in our law and states that the contract is concluded when and where the offeror learns or is informed of the acceptance of his or her offer (see Hutchison and Pretorius *Contract* 59; Study Guide 26-27).

Question 5

An option is

1 only an offer to sell something.

2 both an offer to sell something, and an agreement to keep this offer open.

3 both an offer to sell something, and an agreement to keep this offer open for a certain period.

4 an agreement to make an offer revocable for a certain period of time.

5 none of the above. (1)

Answer

2.

Discussion

An option is a contract to keep an offer open for acceptance for a certain period of time. It comprises both an offer to sell something, and an agreement to keep this offer open (see *Hersch v Nel* 1948 (3) SA 686 (A); Study Guide 29-27).

Question 6

Which term / phrase is **NOT** linked to the characteristic features of a contract?

1 Juristic act.

2 Bilateral in nature.

3 Unilateral promise.

4 Multilateral in nature.

5 Promises or undertakings. (1)

Answer

3.

Discussion

The term/phrase unilateral promise is not linked to the characteristic features of a contract because the conclusion of a contract is a bilateral, or even multilateral juristic act involving promises or undertakings (see Hutchison and Pretorius *Contract* 7).

Question 7

X wants to conclude a lucrative contract with company Y. To ensure that he is successful, X agrees with the agent of Y, who is responsible for concluding contracts on behalf of Y, that for a fee of R50 000 the agent will ensure that the contract will be awarded to X. After the contract

has been concluded between X and Y, and both parties have performed, the financial director of Y discovers how X secured the contract. The issue emanating from these facts relates to

1 duress.

2 undue influence.

3 commercial bribery.

4 misrepresentation

5 mere commercial competition. (1)

Answer

3.

Discussion

Commercial bribery involves the situation where a party bribes the agent or representative of another party to facilitate a contract between the briber and the party whom the agent represents (see Study Guide 66; *Extel Industrial (Pty) Ltd & Another v Crown Mills (Pty) Ltd* 1999 (2) SA 719 (SCA) 724; Hutchison and Pretorius *Contract* 147).

Question 8

Assume the same facts in question 7. Which statement(s) is/are **CORRECT**?

1 The contract between X and the agent is illegal and void.

2 The agent will be able claim payment of R50 000 from X.

3 The contract between X and Y is voidable at the instance of Y.

4 The contract between X and Y is voidable at the instance of both X and Y.

5 Options 1 and 3. (1)

Answer

5.

Discussion

Both options 1 and 3 are correct. See *Extel Industrial (Pty) Ltd & Another v Crown Mills (Pty) Ltd* 1999 (2) SA 719 (SCA); Study Guide 66.

Question 9

X is a keen golfer who has played at many golf tournaments over the years as an amateur. She is very well informed about the rules pertaining to her amateur status as a golfer and knows that amateurs can only claim a maximum of R1 000 in prize money at golf tournaments. X participated in a recent golfing tournament wherein she achieved a hole-in-one at the 9th hole. At this hole was an advertising board which read: “Hole-in-one prize sponsored by Speedy Motors to the value of R90 000”. The prize was parked next to this board in the form of a new car. X claimed the prize from Speedy Motors but they rejected her claim on the basis that the prize could only be claimed by professional players and not amateur players. Regarding X’s claim for delivery of the car, which is the most contentious issue?

1 Whether the acceptance was made by the person to whom the offer was made.

2 Whether the offer was firm.

3 Whether the offer was complete.

4 Whether the acceptance was unqualified.

5 Whether the acceptance was in the form prescribed by the offeror. (1)

Answer

1.

Discussion

This is an offer of reward. All the options are requirements for a valid offer and acceptance (Hutchison and Pretorius *Contract* 50, 57 and 58). The requirements in option 2, 3, 4 and 5 have been met in this problem. It is uncertain whether the requirement in option 1 has been met. X and Speedy Motors are in disagreement on whether the offer was open to X to accept.

Question 10

Assume the same facts in question 9. Which statement is **CORRECT**?

1 Speedy Motors made a misrepresentation regarding their intention to make an offer to participating amateur golf players.

2 Speedy Motors' misrepresentation regarding their intention to make an offer to participating amateur golf players probably did not mislead X and a reasonable person would also not have been misled thereby.

3 Speedy Motors' misrepresentation regarding their intention to make an offer to participating amateur golf players probably mislead X and a reasonable person would also have been misled thereby.

4 Option 1 and 2.

5 Option 1 and 3. (1)

Answer

4.

Discussion

This is a question on error.

In this case, X could not accept the offer, because Speedy Motors did not direct the offer of reward at amateur players but only at professional players. X was an amateur. The minds of the parties have not met and true consensus is absent.

Options 1, 2 and 3 all relate to the requirements for quasi-mutual assent (Hutchison and Pretorius *Contract* 98-100) and more specific to the test set out in *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (2) SA 234 (A) 240:

> In my view, therefore, the decisive question in a case like the present is this: did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention? … To answer this question, a three-fold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party's intention; secondly, who made that representation; and thirdly, was the other party misled thereby? … The last question postulates two possibilities: Was he actually misled and would a reasonable man have been misled?

Speedy Motors made a misrepresentation that is offer of reward was open to all participants in the golf tournament because the offer of reward was apparently directed to all players. Option 1 is thus correct. A reasonable person in X's position would, however, have realised that the offer was open only to professional golfers. X knew that an amateur could not receive such a prize because its value was more than what amateurs could receive. Thus, option 2 is correct but option 3 is incorrect.

2018
Semester 1

1.1 Assignment 01

Question

Read the judgment in *Steyn v LSA Motors Ltd* 1994 (1) SA 49 (A). Identify the judgment of the Appellate Division case on which this judgement is based as well as the relevant section in the prescribed textbook. Read both. You can find judgments in conventional law libraries, online at the website of the Southern African Legal Information Institute (SAFLII) (www.saflii.org) or as an e-resource on the Unisa Library site (choose Juta Law Online Publications and then South African Law Reports). **Then use those authorities to answer** the following question:

John, a racehorse owner, advertises for sale the horse Fire for R1.5 million. In the advertisement it is stated that Fire is an offspring of the legendary July winner, Lightning. Peter is a horse breeder who specifically wishes to introduce the bloodline of Lightning into his stud. He agrees orally with John to buy Fire for R1.5 million. Later, in order to meet the requirements of the horse breeders' association, John has a written contract drawn up which Peter signs in John's presence without reading. The contract makes no mention of Fire's ancestry, but does contain a clause exempting John from liability for any representations made during negotiations or in the contract. Peter's attention is not drawn to the provisions of this clause. A month later Peter finds out that Fire is in fact not an offspring of Lightning, although at the time of the conclusion of the contract John genuinely and without any fault on his part believed that to be the case. Advise Peter on whether the contract of sale is valid. Substantiate your advice and refer to relevant case law. Do not apply the law with regard to misrepresentation or the Consumer Protection Act 68 of 2008 to this question. (10)

Answer

In order to identify the law, which you should apply to the problem, you were asked to:

(1) read *Steyn v LSA Motors Ltd* 1994 (1) SA 49 (A) to determine the *ratio decidendi* of the case;

(2) identify the Appellate Division case on which the *ratio decidendi* of *Steyn* was based;

(3) identify the relevant section(s) in the textbook; and

(4) not to discuss misrepresentation.

(1) T**he *ratio decidendi*** *of the Steyn case*

The court held that Steyn could not accept the offer, because the offer was not directed at him. A reasonable person in Steyn's position would have realised that the offer was open only to professional golfers and, accordingly, that he had no contractual claim to the car. This answers the third leg of the test in *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (2) SA 234 (A).

(2) Identify the AD case on which the *ratio decidendi* in *Steyn* was based

The decision in *Steyn* case, was thus based on *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (2) SA 234 (A).

The court stated the test as follows (239-240):

> "In my view, therefore, the decisive question in a case like the present is this: did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention? … To answer this question, a three-fold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party's intention; secondly, who made that representation; and thirdly, was the other party misled thereby? …The last question postulates two possibilities: Was he actually misled and would a reasonable man have been misled?"

(3) Identify the relevant section in the textbook

If the "Table of cases" is consulted at the end of Hutchison and Pretorius (eds) *The law of Contract in South Africa* 3rd ed (2017) Oxford, Cape Town you will find the pages where *Steyn* and *Sonap* are discussed in the textbook. One of the pages on which *Steyn* is discussed is page 109. In footnote 214 the *Steyn* case is identified as an example of an instance where there is no objective appearance of agreement. Remember that, before the *iustus error* approach can apply, there must be a clear, objective agreement between the parties, such as when the parties have signed a contractual document. In *Steyn,* the court did not apply the *iustus error* approach, because no apparent or ostensible contract existed between the parties. Steyn had one interpretation of the offer (that it was open to all players) and the sponsor another (that it was only open to professional players). Consequently, there was no clear, apparent contract and the *iustus error* approach could not be applied.

In Hutchison and Pretorius *Contract* 106-108 a discussion of the *Sonap* case is to be found. In this discussion the test quoted above in (2) is identified as the reliance theory.

It is thus clear from the above that the subjective approach of the courts (will theory as qualified by the reliance theory) should be applied to the assignment problem.

(4) Do not discuss misrepresentation

This misrepresentation that you must not discuss cannot be the same as the misrepresentation in the first leg of the three-fold test of *Sonap* (there must be a misrepresentation of the intention of one of the parties), because we know we have to base our answer on *Steyn* and *Sonap* that both deal with error.

So what does the instruction mean? In the given facts, Peter made an innocent misrepresentation with regard to Fire's lineage. This is thus the misrepresentation we need not discuss in so far it does not cause a material mistake.

Identifying the problem

The subjective approach of the courts involves the application of the will theory as qualified by *quasi*-mutual assent (Hutchison and Pretorius *Contract* 93-100).

The facts seemingly indicate that John and Peter have not reached consensus based on the will theory. If that is the case, it is necessary to determine if Peter may be held bound to a contract with John, based on the reliance theory.

Discussing the relevant law applicable to the problem *AND* applying the law to the facts of the problem

The subjective approach implies that we first have to determine whether agreement between the parties exists as required in terms of the will theory or whether a party acted under a material mistake. Consensus has three elements (Hutchison and Pretorius *Contract* 87):

- The parties must seriously intend to contract,
- Be of one mind as to the material aspects of the proposed agreement (the terms and the identity of the parties to it), and
- Be conscious of the fact that their minds have met.

In the present case the innocent misrepresentation regarding Fire's lineage causes a mistake regarding a characteristic (the lineage) of the thing sold, Fire (an *error in substantia*). There are two views on whether such a mistake is material (Hutchison and Pretorius *Contract* 90-92). The one view is that the mistake is not material (*Trollip v Jordaan* 1961 1 SA 238 (A); The other view is that such a mistake is material (*Spenmac (Pty) Ltd v Tatrim CC* 2015 3 SA 46 (SCA). The latter view cannot be correct as the parties wanted to buy and sell the same horse, Fire.

The parties were, however, not in agreement as to the consequences they wished to create: Peter did not know that there was a clause in the contract he signed exempting John from liability for any representations made during negotiations or in the contract, but John knew that the sale included an exemption clause. Peter made a mistake as to the obligations the parties wished to create which excludes *consensus* between the parties (Hutchison and Pretorius *Contract* 88). No contract can thus arise on the basis of the will theory.

The facts of our problem are very similar to that in *Du Toit v Atkinson's Motors Bpk* 1985 2 SA 889 (A) where the appellant signed an agreement without reading it which contained a term excluding the respondent's liability for misrepresentation. The court held that the mistake regarding the exemption clause was material.

This type of mistake also occurred in other cases. In *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 (4) SA 164 (D) the plaintiff believed that he was purchasing the erf shown to him by the seller's agent, while the written contract that he signed indicated the correct erf which was a completely different property. His mistake related to performance and was material. In *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 2 SA 234 (A) the appellant erred with regard the period of the lease which was an aspect of the performance.

A valid contract could still arise in terms of the doctrine of quasi-mutual assent or direct reliance theory (Hutchison and Pretorius *Contract* 98-100 and 106-108). The court stated the test in *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 2 SA 234 (A) 239-240 as follows:

> "In my view, therefore, the decisive question in a case like the present is this: did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention? … To answer this question, a three-fold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party's intention; secondly, who made that representation; and thirdly, was the other party misled thereby? … The last question postulates two possibilities: Was he actually misled and would a reasonable man have been misled?"

One of the parties to the contract, Peter, misrepresented his intention to be bound by the contract by signing the contract. Although it could be argued that John was actually misled by this misrepresentation of Peter, it is clear that a reasonable person in the position of John would not have been misled thereby. John knew in fact that there was no exemption clause in the oral contract while the written contract had such a clause. John should have realised that Peter could have thought that the written contract was also without such a clause and he thus had a legal duty to point out to Peter the presence of this clause in the written contract. There was either no actual or at least reasonable reliance on the part of John.

The giving of appropriate advice

The written contract of sale is invalid because of the lack of actual and apparent consensus.

Total: [10]

1.2 Assignment 02

Question 1

Which statement is **INCORRECT**?

1 Obligationary agreements create one or more obligations.

2 Absolving agreements discharge or extinguish obligations.

3 Real agreements transfer rights.

4 Transfer agreements transfer rights.

5 All binding agreements are contracts. (1)

Answer

5.

Discussion

Option 5 is incorrect because not all agreements are in fact contracts, although they have legal consequences. Only contracts (obligationary agreements) create one or more obligations. See Hutchison & Pretorius (eds) *The Law of Contract in South Africa* 3rd ed (Oxford , Cape Town 2017) 4-5; Eiselen GTS et al *Law of contract. Only study guide for PVL3702* (University of South Africa 2016) 3.

Question 2

Which statement regarding the *iustus error* doctrine is **CORRECT**?

1 The *iustus error* doctrine qualifies the objective approach of our courts to error.

2 The *iustus error* doctrine is very similar to estoppel but does not require fault and prejudice as estoppel does.

3 The *iustus error* doctrine can be used to prove the existence of a contract on the basis of quasi mutual assent.

4 The *iustus error* doctrine amounts to a direct application of the reliance theory.

5 Option 1 and 4. (1)

Answer

1.

Discussion

Option 1 is correct (Hutchison and Pretorius Contract 94 and 101; Study Guide 41 and 45). Option 2 is incorrect because estoppel is very similar to the direct reliance theory or quasi-mutual assent (Hutchison and Pretorius Contract 95; Study Guide 44). Option 3 is also incorrect because the *iustus error* doctrine can only be applied if there is an objective appearance of a contract (Hutchison and Pretorius *Contract* 103); *Study Guide* 44-45). Option 4 is also incorrect because the *iustus error* doctrine amounts to an indirect application of the reliance theory

(Hutchison and Pretorius *Contract* 94 *Study Guide* 46). Option 5 is incorrect because only option 1 is correct.

Question 3

Which cause of action is/are delictual?

1 Mistake.

2 Culpable misrepresentation.

3 Innocent misrepresentation.

4 *Dictum et promissum*.

5 All of the above. (1)

Answer

2.

Discussion

Only option 2 is correct because the cause of action for culpable misrepresentation, in the context of contract or otherwise, is delictual (*Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (A); Hutchison and Pretorius *Contract* 129-135; Study Guide 51 and 53). The requirements for mistake, innocent misrepresentation and a *dictum et promissum* are not that of a delict.

Question 4

In which instance has consensus been obtained improperly?

1 A common error.

2 Rectification.

3 An *error in substantia*.

4 A threat that is not related to an imminent or inevitable evil.

5 An innocent misrepresentation. (1)

Answer

5.

Discussion

The correct answer to the question is option 5 because innocent misrepresentation is a form of improperly obtained consensus and renders the contract voidable and not void (Hutchison and Pretorius *Contract* 118; Study Guide 53).

Option 1 not the correct answer because a common mistake causes the contract to be void although there is consensus (Hutchison and Pretorius *Contract* 111).

Option 2 is not the answer because rectification is a remedy correcting the document to reflect the common intention of the parties (Hutchison and Pretorius *Contract* 112-113).

Option 3 is the correct answer or not the correct answer depending on which case sets out the

law correctly. An *error in substantia* is regarded as a non-material mistake in *Trollip v Jordaan* 1961 (1) SA 238 (A) 253–254, but as material in *Spenmac (Pty) Ltd v Tatrim CC* 2015 (3) SA 46 (SCA) (Hutchison and Pretorius *Contract* 90-92; Study Guide 43-44). A non-material mistake could have been caused by misrepresentation which is a instance were consensus has been obtained in an improper manner. A material error renders the contract void as there is no consensus present.

Option 4 is also not the correct answer because it incorrectly renders one of the requirements for duress. Duress is of course a form of improperly obtained consensus. The correct statement of the requirement is that there **must** be a threat of an imminent or inevitable evil (Hutchison and Pretorius *Contract* 141 and 143).

Question 5

Which cause(s) of action may render the contract void?

1 A fraudulent and negligent misrepresentation.

2 Duress.

3 Undue influence.

4 A reasonable and material mistake.

5 Commercial bribery. (1)

Answer

4.

Discussion

The correct answer is option 4 since a material and reasonable mistake excludes one of the requirement for the existence of a contract, namely consent which renders the contract void (Hutchison and Pretorius *Contract* 102-106; Study Guide 4). Options 1, 2, 3 and 5 are incorrect because misrepresentation, duress, undue influence or commercial bribery only render a contract voidable (ie a contract comes into existence but it may be terminated). In such cases, there is consensus, and as such, the contract is not void. The consent has, however, been obtained in an improper manner, rendering the contract assailable/voidable (Hutchison and Pretorius *Contract* 118; Study Guide 4).

Question 6

X is employed as a bookkeeper in Y's business. X steals money from the business's bank account over a long period of time. Y gets forensic auditors in and they determine that X has stolen R50 000. Y confronts X and threatens to lay a charge of theft against X at the police station unless X signs an acknowledgement of debt for R50 000 and undertakes to pay back the money in monthly instalments of R500 each. X signs because he is afraid to go to jail. Which statement regarding the presence of the requirements for duress is **INCORRECT**?

1 X had a reasonable fear.

2 Ys threat weakened X's power of resistance and rendered X's will compliant.

3 There was a threat of an imminent evil to X.

4 The threat against X was not *contra bonos mores*.

5 The pressure Y used against X caused X to suffer damage. (1)

Answer

2.

Discussion

The statement in option 2 is incorrect because it is not a requirement for duress but it is a requirement for undue influence (Hutchison and Pretorius *Contract* 146).

The statement in options 1 is correct because X signed the acknowledgement of debt out of fear that he could be convicted of theft and consequently go to jail or be fined. This fear was reasonable because he in fact stole the money and a conviction on a charge of theft and the possible incarceration or fine as punishment could reasonably follow (Hutchison and Pretorius *Contract* 142).

The statement in option 3 is correct because the threat of laying a charge of theft against X was imminent and an inevitable evil. X as the threatened party had no reasonable or acceptable alternatives available other than succumbing to the threat by entering into the contract (Hutchison and Pretorius *Contract* 143).

The statement in option 4 is correct because Y's threat was not unlawful and *contra bono mores* because Y did not use the threat to extort a benefit to which he was not entitled to (Hutchison and Pretorius *Contract* 143-144).

The statement in option 5 is correct because the pressure from Y caused X to sign the acknowledgement of debt. X incurred obligations he would not have otherwise had. The mere signature of the contract thus amounts to duress (*Broodryk v Smuts* 1942 TPD 47 F (3) 51-52; Hutchison and Pretorius *Contract* 144).

Question 7

X sent an offer by email to Z on 1 February. Z downloaded the email to her computer on 6 February, but only read it on 7 February. Z sent an email to X on 8 February, in which she accepted the offer. Z's email reached X's service provider on 9 February and could have been downloaded by X on that date. X only downloaded Z's email and read it on 11 February. When was the contract between X and Z concluded?

1 6 February.

2 7 February.

3 8 February.

4 9 February.

5 11 February. (2)

Answer

4.

Discussion

The correct answer is option 4. Section 22(2) of the Electronic Communications and Transactions Act 25 of 2002, provides that an agreement concluded between parties by means of data message is concluded at the time when, and place where, the acceptance of the offer is received by the offerer (Hutchison and Pretorius *Contract* 63). The reception theory explains this provision. As a result the contract between X and Z was concluded when Z's email reached X's service provider on 9 February and could have been downloaded by X on that date.

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Question 8

X promises to give Y R10 000 if Y successfully passes her matric examination at the end of the year. This is an obligation subject to a:

1 suspensive time clause.

2 resolutive time clause.

3 suspensive condition.

4 resolutive condition.

5 *modus*. (1)

Answer

3.

Discussion

The correct answer is option 3. X's obligation to pay Y R10 000 is subject to the occurrence of an uncertain future event, Y's passing of the exam (Hutchison and Pretorius *Contract* 260).

Option 1 and 2 are both incorrect because there is no time clause in this scenario (Hutchison and Pretorius *Contract* 262). The end of the year determines when the suspensive condition has to be fulfilled.

Option 4 is incorrect because there is no term in X and Y's agreement that determines that the performances come to an end if an uncertain future event does or does not occur (Hutchison and Pretorius *Contract* 260).

Option 5 is incorrect because the obligation in this case does not charge Y with the duty to do something in the future (Hutchison and Pretorius *Contract* 262).

Question 9

Y sells his car to Z for R20 000 on 15 January. Y undertakes to deliver the car to Z on 17 January. The undertaking to deliver the car on 17 January is a

1 suspensive time clause.

2 *essentialium* (singular for *essentialia*).

3 *incidentalium* (singular for *incidentalia*).

4 option 1 and 2.

5 option 1 and 3. (1)

Answer

5.

Discussion

The correct answer is option 5.

Option 1 is correct because the future date that has been set for performance (delivery of the car to Z on 17 January) is certain to happen and suspends performance until that date (Hutchison and Pretorius *Contract* 262).

Option 3 also is correct because the obligation to deliver the car on 17 July is an *incidentalium* (singular of *incidentalia*). An *incidentalium* is a term which is not an *essentialium* singular of *essentialia*) or *naturalium* (singular of *naturalium*) of a contract of sale (Hutchison and Pretorius *Contract* 247-248).

Option 2 is the only incorrect answer because the undertaking to deliver the car on 17 January is not a distinctive term that identifies or classifies the common law contract of sale. The *essentialia* of a sale is the obligation to pay a price and the obligation to deliver a thing. This term in our scenario determines when Y has deliver the thing and when Z must pay the price, because these performances has to be performed at the same time.

Question 10

The courts use the hypothetical bystander test when determining the possible existence of

1 *essentialia*.

2 *naturalia*.

3 terms implied by law.

4 tacit terms.

5 express terms. (1)

Answer

4.

Discussion

In ascertaining whether a contract contains a tacit term, the courts often employ the officious bystander test (Hutchison and Pretorius *Contract* 257). Option 4 is thus correct.

2017
Semester 1

1.1 Assignment 01

Question

X is on her way from work and sees a white bull terrier bitch hiding in a doorway. Being an animal lover, she takes the dog home with her. The next day, she sees the following advertisement in the newspaper:

> Lost in Johannesburg City Centre on 27 May. Pedigree white bull terrier bitch with black patch over left eye. Answers to the name of Beauty. Reward of R1 000 for information leading to safe return. Tel 011 555 5555.

She realises that the dog she found matches the description given. She calls the advertiser who rushes over to be joyfully united with Beauty. In his joy, Beauty's owner, Y, seems to forget about the reward and X wishes to claim it from him. Will she be successful? Substantiate your answer. (10)

Answer

Identifying the problem

X will only be able to claim the reward if a valid contract arose between X and Y. A valid contract will arise if there was a valid acceptance of a valid offer.

Discussing the relevant law applicable to the problem AND applying the law to the facts of the problem

Y's advertisement complies with the requirements for a valid offer:

1 Y's offer was firm. The offer must be made with the intention that its acceptance will result in a binding contract. Although an advertisement is usually only an invitation to do business (*Crawley v Rex* 1909 TS 1105), a promise of reward does constitute a firm offer (*Bloom v American Swiss Watch Co* 1915 AD 100). Y's offer was thus a firm offer and not a tentative statement with a possible agreement in mind.

2 Y's offer was complete. An offer must include all material terms of the proposed agreement and there cannot be additional matters that still have to be discussed before the agreement can take effect. Y's offer contained all the material terms: providing information leading to the safe return of Beauty in return for the reward of R1 000. The offer will be accepted by providing the required information.

3 Y's offer was clear and certain. An offer is sufficiently clear and certain if the mere answer of 'yes' by the addressee brings a valid contract into existence. If the offer is unclear and cannot capture what the offeror has in mind, no acceptance of the offer can create a binding contract. The offer by Y was clear: a reward of R1000 was offered to the any member public for the giving of information leading to the safe return of Beauty. The giving of the required information will also constitute acceptance of the offer. Furthermore, it is clear that an offer such as a promise of reward can be validly directed at undefined persons.

Providing the information by X was a valid acceptance of Y's offer:

1 X's acceptance was unqualified, because X accepted the offer as it was by giving the required information. The acceptance is complete and unequivocal, where the entire offer and nothing additional or less is accepted.

2 X's acceptance was by the person to whom the offer was made because X was a member of the public. Only the offeree can validly accept the offer (*Bird v Sumerville* 1961 (3) SA 194 (A). The general rule is that an offer should be addressed to a specific person, but an offer may also validly be directed to the public, such as an offer of a reward.

3 X's acceptance was a conscious response to the offer, because X was aware of the reward and provided Y with the required information in response to it. In *Bloom v American Swiss Watch Co* 1915 AD 100, the plaintiff provided the information required in the offer of reward without knowing of the reward. The court held that no contract came into being.

4 X accepted the offer in the form prescribed by the offeror by providing Y with the required information which led to the dog's safe return to Y. The offeror is allowed to prescribe any method of acceptance he or she sees fit (*Carlill v Carbolic Smoke Ball Co* (1893) 1 QB 256).

X and Y thus concluded a valid contract, because both the offer and acceptance was valid.

The giving of appropriate advice

X will be successful in claiming the reward from Y.

See Hutchison and Pretorius (eds) *The law of Contract in South Africa* 2nd ed (Oxford University Press Southern Africa 2012) 48–9, 50-1, 52, 55-6.

Total: [10]

1.2 Assignment 02

Question 1

A real agreement is an agreement

1 only creating obligations.

2 whereby a right is transferred.

3 only extinguishing a debt.

4 an example of which is release or discharge.

5 that cannot entail the transfer of ownership of property. (1)

Answer

2.

Discussion

Option 2 is correct (Hutchison and Pretorius (eds) *The law of Contract in South Africa* (Oxford University Press Southern Africa 2012) 4). Options 1, 3, 4 and 5 are all incorrect (Hutchison and Pretorius *Contract* 4-5).

Question 2

Portia and Lucas are engaged and living together. They want to purchase Jerome's car. Jerome offers to sell his car to Lucas for R100 000. Lucas and Portia accept Jerome's offer. Which statement is **CORRECT**?

1 Only Lucas could accept the offer.

2 Either Lucas or Portia could accept the offer as they are engaged.

3 Since the offer was only made to Lucas, the acceptance from both Portia and Lucas will never constitute a counter-offer.

4 A valid contract has been concluded, because Lucas is one of the parties that accepted the offer.

5 None of the above statements. (1)

Answer

1.

Discussion

The answer is option 1, since an offer can only be accepted by the person to whom it was made (*Bird v Summerville* 1961 (3) SA 194 (A)). In this question the offer was made to Lucas.

Therefore, only Lucas can accept the offer. This also automatically excludes options 2 and 4. With regard to option 3 Portia and Lucas are making a counter-offer because their acceptance changes the terms of the offer. They are replacing Lucas with Lucas and Portia as purchasers (Hutchison and Pretorius *Contract* 55-56).

Question 3

X orally offers to sell her painting to Z for R20 000 on 1 April. In terms of the offer X stipulates that her offer will lapse on 30 April. On 15 April X notifies Z orally that she (X) revokes her offer. On 25 April Z notifies X orally that he (Z) accepts the offer. Which statement reflects the **CORRECT** legal position?

1 A right of pre-emption exists.

2 The revocation by X is valid, because an offer can be revoked where an option was given.

3 An option exists because X offered to keep her offer open until 30 April, which was accepted on 25 April.

4 The revocation by X is valid because no option contract was concluded.

5 The option is not valid because in *Brandt v Spies* 1960 (4) SA 14 (E) it was held that such an option must be in writing. (1)

Answer

4.

Discussion

Option 1 is incorrect because no right of pre-emption exists. A right of pre-emption occurs when a prospective seller agrees with a prospective purchaser to give the latter preference if the former should decide to sell (Eiselen GTS et al *Law of contract. Only study guide for PVL3702* (University of South Africa 2016) 34).

Option 2, 3 and 5 all presuppose the existence of an option. An option occurs when contracting parties enter into an agreement in terms of which the offeror undertakes not to revoke his or her offer (Study Guide 29). In this question, an option does not exist because there is no agreement in place which binds X to keep her offer open until 30 April. X has only unilaterally indicated in the offer that the offer is open till 30 April, but there was no agreement that X has to keep her offer open until this date.

It follows that option 4 is the correct answer, because an offer not protected by an option can be revoked by the offeror (Hutchison and Pretorius *Contract* 54).

Question 4

An innocent misrepresentation renders a contract

1 void.

2 void without a claim for damages.

3 voidable.

4 unenforceable.

5 neither void nor voidable, but it does give rise to a claim for damages. (1)

Answer

3.

Discussion

This question relates to the legal consequences of innocent misrepresentation. An innocent misrepresentation does not usually give rise to a material mistake which makes the contract void (Hutchison and Pretorius *Contract* 121 (figure 4.2), 122-5). An innocent misrepresentation usually gives rise to no more than a mistake in motive which is not a material mistake. There is one exception where an innocent misrepresentation can give rise to a material error and that is when it causes an error similar to that in *Spenmac (Pty) Ltd v Tatrim CC* 2015 (6) 46 (SCA). This case has created a great amount of uncertainty. See Study guide 42-4 in this regard. Option 1 and 2 are general statements and as such not correct.

Option 4 cannot be correct because a contract is only unenforceable where the enforcement is against public policy (Hutchison and Pretorius *Contract* 188-90, 192-3).

Option 5 is also wrong because it is uncertain whether innocent misrepresentation could give rise to a claim for damages (Hutchison and Pretorius *Contract* 131-2).

That leaves us with option 3. The innocent party may usually rescind the contract in the case of an innocent misrepresentation which means that such a contract is voidable (Hutchison and Pretorius *Contract* 121 (figure 4.2), 122-5). There is one exception to this and that is where the innocent misrepresentation causes a material mistake and the contract is void (see above). Option 3 is thus strictly speaking incorrect, but it is the most correct option.

Question 5

Which statement is/are **CORRECT**?

1 Commercial bribery amounts to an abuse of circumstances.

2 Commercial bribery amounts to misrepresentation.

3 Commercial bribery can lead to a claim for the setting aside of the contract and restitution.

4 Option 1 and 3.

5 Option 2 and 3. (1)

A**nswer**

3.

Discussion

Option 1 is incorrect because abuse of circumstances is closely linked to undue influence or duress and it deals with a situation where a person unconscionably exploits an emergency situation to secure consent to a prejudicial contract (Hutchison and Pretorius *Contract* 142-3). Commercial bribery has, however, to do with the reward paid or promised to be paid to an agent by the briber in order for the agent to exert influence over the principal in order for the principal to enter into, maintain, or alter a contractual relationship with the briber, his principal, associate or subordinate (*Extel Industrial (Pty) Ltd v Crown Mills (Pty) Ltd* 1999 (2) SA 719 (SCA) 724)).

Option 2 is incorrect for the reason that in the case of misrepresentation a misstatement is made (Hutchison and Pretorius *Contract* 116) which is not the case in commercial bribery.

Option 3 is correct (Study Guide 67).

Options 4 and 5 are thus incorrect.

Question 6

X, who lives in Cape Town, writes a letter to Y, who lives in Johannesburg. In the letter, she offers to sell her house to Y for R900 000. She posts the letter in Stellenbosch while visiting her daughter. A week later Y receives the letter, reads it, and immediately phones X on her landline. Y requests X to keep her offer open for a week and she undertakes to do. A day before the option expires, X phones Y and revokes her offer to sell her house. Y immediately posts a letter of acceptance in which he exercises the option. X only receives this letter a week later. Which statement is **CORRECT**?

1 The substantive offer to sell the house does not contain all the *essentialia* of a contract of sale.

2 The option contract is valid.

3 The option contract was exercised too late as Y's letter of acceptance only reached X after the option lapsed.

4 According to the courts, X can validly revoke her offer to sell her house before Y exercises the option.

5 The option contract is concluded in Cape Town. (1)

Answer

2.

Discussion

In this problem we have two possible contracts: an option contract and a contract of sale (Study Guide 31).

The substantive offer of sale contains the two *essentialia* of a contract of sale: X undertakes to deliver the thing sold (X's house) and Y undertakes to pay a price (R900 000) (Hutchison and Pretorius *Contract* 161 237). Option 1 is thus incorrect.

X makes a valid offer to sell her house by post, because it complies with the formalities required by the Alienation of Land Act 68 of 1981 (Hutchison and Pretorius *Contract* 161-2): It is written and most probably signed, contains all the *essentialia* of a contract of sale and identifies the parties. Although the option contract is oral, it need not comply with the formalities required by the Alienation of Land Act 68 of 1981 (Study Guide 33). Option 2 is thus correct.

The courts have held that the substantive offer cannot be validly revoked before it is accepted (the exercise of the option) (Study Guide 30). Option 4 is thus incorrect.

The substantive offer was made by post and this is regarded as a tacit authorisation of Y to accept the offer by post and a tacit indication that the contract of sale will be concluded as soon as and where the letter of acceptance has been posted (Hutchison and Pretorius *Contract* 56-9). The contract of sale is thus concluded when and where the letter of acceptance has been posted: in Johannesburg a day before the option expires. Option 3 is thus incorrect. The option is furthermore exercised in writing and signed (letters are usually signed). The contract of sale thus complies with the requirements of the Alienation of Land Act 68 of 1981.

The option contract is concluded by phone and the normal rule regarding time and place of conclusion of a contract applies (Hutchison and Pretorius *Contract* 56-8). The option contract is concluded when and where the offeror (Y) hears that her offer has been accepted by the offeree (X). Y phoned X on her landline which means X was at her home in Cape Town and Y in Johannesburg. The option contract is thus concluded in Johannesburg, because that is where Y heard that his offer for X to keep the substantive offer open was accepted. Option 5 is thus incorrect.

Question 7

John agrees with Michael, that Michael will paint John's holiday home at the coast for R30 000. Unbeknown to either of them the house had been destroyed in a storm the previous day. This is a case of

1 mutual mistake.

2 an obligation subject to a suspensive time clause.

3 impossibility of performance.

4 an obligation subject to a resolutive condition.

5 an obligation subject to a suspensive condition. (1)

Answer

3.

Discussion

Option 1 is incorrect because both John and Michael are not mistaken about each other's intentions or are not at cross-purposes (Hutchison and Pretorius *Contract* 82). They both agreed on the painting of John's holiday home for R30 000.

Option 2 is incorrect, because no future date has been set for performance (painting of the house). There is no time clause which postpones the commencement of the operation of the obligation to paint the holiday home dependant on an event or time that is certain to arise in the future (Hutchison and Pretorius *Contract* 251).

Option 3 is correct since there is impossible to paint a house that has been destroyed. This impossibility existed at the conclusion of the contract (Hutchison and Pretorius *Contract* 205-206). No obligation will be created and this renders the contract void.

Option 4 is incorrect because there is no term in John and Michael's agreement that determines that the performances come to an end if an uncertain future event does or does not occur (Hutchison and Pretorius *Contract* 250).

Option 5 is incorrect as John and Michael did not agree that the contract to paint the holiday home will only be enforceable if an uncertain future event does or does not occur. (Hutchison and Pretorius *Contract* 249-250).

Question 8

C, a builder, and O agree that C will build a house on O's stand for R800 000, payable on completion of the house. Which statement is **CORRECT?**

1 The obligation to pay R800 000 is an alternative obligation.

2 The obligation to pay R800 000 is a facultative obligation.

3 The obligation to pay R800 000 is a generic obligation.

4 The contract is a reciprocal contract.

5 Option 3 and 4. (1)

Answer

5.

Discussion

Option 1 is incorrect because O is obliged to perform only one performance (payment of R800 000) and not one performance from two or more specified alternatives (Hutchison and Pretorius *Contract* 235).

Option 2 is also incorrect. The debtor O has no choice to perform another performance than the payment of R800 000 to C (Hutchison and Pretorius *Contract* 235).

Option 3 is correct because any R800 000 must be paid (Hutchison and Pretorius *Contract* 235).

Option 4 is also correct. The obligation of C, the builder, is linked to the obligation of O, the owner, in that one performance is owed in exchange for the other. O does not have to pay R800 000 unless C builds the house (Hutchison and Pretorius *Contract* 234-235).

Students often have difficulty in determining who the debtor and creditor in a contract is. We will use this problem to explain how to determine who the debtor and who the creditor is. Two obligations arises out of the contract (the obligation to build a house and the obligation to pay R80 000). There are thus two rights and two duties. The builder of the house, C, is the debtor of the performance to build the house, but he is the creditor of the right to receive payment of R800 000. O, too, is both debtor and creditor: O is a debtor because he/she owes C payment of R800 000 and also a creditor because he/she has the right to claim the building of the house from C.

Option 5 is the correct answer because both options 3 and 4 are correct.

Question 9

X buys a stand from Y for R300 000 after being told by Y that business rights existed on the stand. Later it emerges that no such rights exist. Y, however, believed in good faith that business rights did exist on the stand. The contract contains a term which excludes Y's liability for "any misrepresentation". X did not know of the existence of this clause because she did not read the contract of sale before signing it in Y's presence. The contract of sale complies with the formalities prescribed for contracts of sale of land. What type(s) of mistake does X make?

1 Mistake regarding an attribute or characteristic of the subject matter of the contract if the approach of *Trollip v Jordaan* 1961 (1) SA 238 (A) is followed.

2 Mistake regarding the legal consequences of the contract.

3 Mistake regarding the identity of the subject matter of the contract if the approach of the court in *Spenmac (Pty) Ltd v Tatrim CC* 2015 (3) SA 46 (SCA) is followed.

4 Mistake regarding the nature of the contract.

5 Option 1, 2 and 3. (1)

Answer

5.

Discussion

This question relates to the type of mistake which X made. X was mistaken about the existence of business rights on the stand and on the presence of the exemption clause in the contract (Study Guide 42-4; Hutchison and Pretorius *Contract* 85-9).

Option 1 is correct because if we apply the analysis of the *Trollip* case (Study Guide 43) to the facts of this problem, it is clear that the parties wanted to buy and sell the same thing, a specific stand. The existence of business rights is at the most a characteristic of the stand. X thus erred with regard to a characteristic of the performance (an *error in substantia*) which is not material.

Option 2 is also correct because X did not know of the existence of the clause excluding Y's liability for "any misrepresentation" and thus erred with regard to the legal consequences of the contract (Hutchison and Pretorius *Contract* 86).

Option 3 is also correct because if the approach of the court in the *Spenmac* case is followed the mistake of the purchaser would be regarded as a mistake as to subject matter of the sale (*error in corpore*). This type of error is material.

Option 4 is incorrect because the error X operated under does not relate to the true nature of the contract (*error in negotio*) (Hutchison and Pretorius *Contract* 88). X wanted to buy the stand and the contract is indeed one of sale.

Option 5 is the correct answer because options 1, 2 and 3 are correct.

Question 10

Assume the same facts as in **question 9.** This question deals with X's mistake regarding the presence of the exemption clause in the contract. Which statement(s) is/are **CORRECT**?

1 X made a misrepresentation regarding her intention to be bound to the contract of sale.

2 X's misrepresentation regarding her intention to be bound to the contract of sale probably did not mislead Y and a reasonable person would also not have been misled thereby.

3 X's misrepresentation regarding her intention to be bound to the contract of sale misled Y and a reasonable person would also have been misled thereby.

4 Option 1 and 2.

5 Option 1 and 3. (1)

Answer

4.

Discussion

All the options in this question relates to the subjective approach of the courts to mistake (the doctrine of quasi mutual assent or the direct reliance approach) (Hutchison and Pretorius *Contract* 95-7) and to be more specific, the test of *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (2) SA 234 (A) (Hutchison and Pretorius *Contract* 103-5).

If the threefold test of the *Sonap* case is applied to the facts of this problem the following becomes clear:

1 X made a misrepresentation that he/she wanted to be bound to the contract by signing the contract. Options 1 is thus correct.

2 The misrepresentation in 1 was made by a party to the contract, X.

3 Y was probably not misled by X's misrepresentation, but a reasonable person in Y's position would certainly not have been misled thereby. Y saw that X signed the contract without reading it first and thus knew that X did not know of the exemption clause in the contract. Y thus had a duty to speak and inform X of the exemption clause.

Total: [10]

2016
Semester 1

1.1 Assignment 01

Question

S, who lives in Upington, sends P, who lives in Grahamstown, a letter by post in which she offers to sell him (P) her (S's) motorcycle, a collectors piece, for R100 000. She states in her letter that her offer will expire on 1 February at 24h00. P phones S on 1 February at 19h00, but S and her husband are out for the evening. P leaves a message on S's voice mailbox accepting S's offer. S only listens to P's message on 2 February. P tenders payment of R100 000 but S refuses to accept payment. Did a valid contract of sale arise between S and P? Advise P. Substantiate your answer. (10)

In the assignment you were inter alia referred to study unit 10 in answering the assignment. This was a mistake and it should have been study unit 7. We did not notice this mistake until it was too late to correct it. Some students failed to notice this mistake and focused on the subjective approach to error of the courts, but others noticed this mistake and correctly discussed the time and place of conclusion of the contract. Both approaches were marked as correct.

First possible answer

This is the answer we marked as correct if you failed to realise that we made a mistake.

Identifying the problem

The question is whether P accepted S's offer in time and S and P thus reached consensus. S did not know that her offer was accepted by P on the date the offer expired (1 February) as she only became aware of the acceptance on the next day. See Hutchison and Pretorius (eds) *The law of Contract in South Africa* Oxford University Press Southern Africa 2012 54 56-60.

Discussing the relevant law applicable to the problem *AND* applying the law to the facts of the problem

S may only refuse payment of the purchase price if a valid contract did not arise. In our problem S made an offer to sell her motorcycle, but stated in her offer that her offer will expire on 1 February at 24h00. An offer which has a time limit for acceptance lapses automatically if it is not accepted within the prescribed period (Hutchison and Pretorius *Contract* 54). The question is thus whether P's acceptance of the offer which was recorded in the voicemail was a valid and timeous acceptance.

We will have to apply the subjective approach of the courts (the will theory) to the facts, because we do not have an objective appearance of agreement (Hutchison and Pretorius *Contract* 106). Consensus has three elements (Hutchison and Pretorius *Contract* 14 85): the

parties must seriously intend to contract, be of one mind as to the material aspects of the proposed agreement (the terms and the identity of the parties to it), and be conscious of the fact that their minds have met. The latter was absent on the date of expiry of the offer, because S only came to know of the acceptance on the next day when she listened to her voicemail. The offer thus expired after effluxion of the prescribed time (Hutchison and Pretorius *Contract* 54). The parties failed to reach subjective consensus.

The next step is to apply estoppel and the doctrine of quasi mutual assent (Hutchison and Pretorius *Contract* 92-97 103-104). Estoppel cannot be applied, because S misrepresented no facts from which a reasonable inference of consensus could be made (Hutchison and Pretorius *Contract* 93-94). One surely cannot draw such inference from the fact that S made an offer which would expire at a certain specified time.

The doctrine of quasi mutual assent determines that contractual liability can arise if the one party induces a reasonable belief on the part of the other party that the former party had agreed to the contract in question (Hutchison and Pretorius *Contract* 95). In other words, did S create a reasonable belief in P that she had agreed to the contract of sale? Again the answer is no, because she only made an offer which would expire at a certain specified time. P could not reasonably deduce from this that S agreed to the contract of sale even if the offer expired. The same result will be achieved if the threefold test of *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianus* 1992 (3) SA 234 (A) is applied to our problem. The answer to the first test is negative as S did not misrepresent her intention to P that she wishes to be bound to a contract even if the offer expires on the specified time.

The giving of appropriate advice

The written contract of sale is invalid, because actual and apparent consensus is lacking.

Total: [10]

Second possible answer

This is the answer we marked as correct if you realised that we made a mistake.

Identifying the problem

The question is whether P accepted S's offer in time and S and P thus reached consensus. To be more specific, the question is relates to the legal rules pertaining to when and where the acceptance takes effect (Hutchison and Pretorius (eds) *The law of Contract in South Africa* Oxford University Press Southern Africa 2012 56-60).

Discussing the relevant law applicable to the problem *AND* applying the law to the facts of the problem

In our problem S made an offer to sell her motorcycle by post, but stated in her offer that her offer will expire on 1 February at 24h00. An offer which has a time limit for acceptance lapses automatically if it is not accepted within the prescribed period (Hutchison and Pretorius *Contract* 54). The question is thus whether P validly accepted the offer before 24h00 on 1 February. If P did so, acceptance will take effect and a contract of sale will arise.

P's acceptance of the offer was a voice message left in the voice mailbox of S before 24h00 on 1 February. S only listened to the message on 2 February and thus did not know that her offer was accepted at the time of termination of the offer.

The general rule is that a contract only comes into being when the offeror knows that his/her offer has been accepted (Hutchison and Pretorius *Contract* 57). The theory which explains this rule is the information theory. This general rule gives effect to one of the requirements of subjective consensus (Hutchison and Pretorius *Contract* 13-14) which is the primary basis of contractual liability (Hutchison and Pretorius *Contract* 19). If we apply the general rule, it is clear the offer expired before acceptance.

But this is not the end of our enquiry because there are exceptions to the general rule (Hutchison and Pretorius *Contract* 57-59). The offeror as *dominus* may dispense with the need of acceptance being communicated to him /her or can indicate in the offer that the contract will come into being at an earlier stage. This may be expressly indicated in the offer itself, but this is not the case in our problem. It may also be implied from all the circumstances, the language of offer itself and the nature of the contract. Where an offer is made through the post it is assumed (a legal fiction thus) if certain the requirements are met that the offeror authorised acceptance by post as well as indicated that the contract is concluded as soon as the acceptance is posted (*Kergeulan Sealing and Whaling Co v Commissioner of Inland Revenue* 1939 AD 487). The expedition theory explains the postal rule.

All four the requirements for the application of the postal rule are present in our problem. The offer firstly was made by post. Secondly, the fact that S's offer reached P indicates that the postal service was operating normally (*Bal v Van Staden* 1902 TS 128). Thirdly, the contract that S envisaged in her offer was a contract of sale which is a commercial contract (*S v Henckert* 1981 (3) SA 445 (A) 451). Lastly, S did not expressly or tacitly indicate a contrary intention in her offer (*A-Z Bazaars (Pty) v Minister of Agriculture* 1975 (3) SA 468 (A) 476).

P did not accept in the authorised manner by post. The leaving of a message in the voice mailbox of S cannot be seen as an acceptance by post and the exception created by the offer by post thus cannot apply.

As a consequence, the general rule must out of necessity apply: S had to hear that her offer was accepted before the time of termination of her offer. S did not and her offer automatically lapsed and there was no offer left to be accepted when she listened to her voicemail on 2 February and heard that her offer was accepted.

The Electronic Communications and Transactions Act 25 of 2002 cannot be applicable to our problem. Section 22(2) is only applicable to an agreement concluded between parties by means of data messages. The contract of sale in our problem has not thus been concluded. The message in the voicemail is a data message but the offer by post is certainly not.

The giving of appropriate advice

No contract of sale came into being because P failed to accept S's offer timeously. S may thus validly refuse to accept P's performance in terms of an invalid contract.

General comments on the second possible answer

Some students experienced difficulty in solving this problem. We have to think logically and systematically to solve this problem. We must also apply the following legal knowledge which we should have acquired by now.

We should firstly understand that the law often regulates a situation in a certain way and then creates exceptions to this the general rule. If one of the exceptions does not apply to a given set of facts, the general rule applies.

We have to secondly understand that theories try to explain what the law does and that they are not the law itself. In this problem we have different theories which explain when an acceptance has effect and a contract comes into being. So for instance, an offer by post does not mean that the expedition theory is authorised. No. The offeror is assumed to empower the addressee to accept the offer by post and to provide that the contract comes into being as soon as the letter of acceptance is posted. When we analyse this rule we can say that expedition theory applies. We must not confuse the law and our explanation of the law. Some students incorrectly thought that the offer by post authorised the expedition theory and then applied this theory to the acceptance left in the voicemail. If the offer was accepted by letter but sent by courier to the offeror in our problem, we cannot argue that the expedition theory was authorised and that the contract was concluded as soon as the letter was given to the courier.

Thirdly, legislation often changes the common law, but only insofar as the Act is applicable. We must thus determine whether an Act is applicable to a specific set of facts. If it is not, the common law applies. So for instance section 22(2) of the Electronic Communications and Transactions Act 25 of 2002 is only applicable to agreements concluded between parties by means of data messages.

Total: [10]

1.2 Assignment 02

Question 1

Z walks into a shop, and puts R10 on the counter and points to a packet of sweets. X (the owner of the shop) takes the money and hands over the sweets to Z. Which statement is **CORRECT**?

1 There is an oral offer, and acceptance by conduct.

2 There is an express offer, and an oral acceptance.

3 There is both an offer, and acceptance by conduct.

4 There is an offer by conduct, and an express oral acceptance.

5 There is a firm oral offer, and an unqualified acceptance. (1)

Answer

3.

Discussion

Option 3 is correct. All the other options are incorrect because there is neither an oral offer, nor an oral acceptance. No words were exchanged between the parties. The placing of the R10 on the counter and pointing to the sweets constitutes an offer by conduct. Z taking the money amounts to an acceptance by conduct. See Hutchison and Pretorius (eds) *The law of Contract in South Africa* Oxford University Press Southern Africa 2012 46.

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Question 2

Carol, an owner of an exclusive bicycle shop advertised a special limited edition bicycle for sale, and invited the public to make offers for the bicycle. Jane and Portia were among many other people who submitted written offers for the bicycle. Jane's offer was for R150 000, and Portia's offer was for R160 000. Although Carol intended to accept Portia's offer, she erroneously accepted Jane's offer. Carol's mistake is

(a) not material.

(b) an *error in persona*.

(c) an error in motive.

(d) material.

1 (a).

2 (b).

3 (c).

4 (b) and (d).

5 (a), (b) and (c). (1)

Answer

4.

Discussion

Options (b) and (d) are correct. Option (b) is correct because there is a mistake relating to the identity of the parties with whom Carol intended to contract with (an *error in persona*) (Hutchison and Pretorius *Contract* 88). Carol's mistake was material because she inadvertently accepted the offer of one party (Jane), whereas she intended to accept the offer of a completely different party (Portia). The facts in this problem are similar to the facts in *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A), where the Appellate Division found that the mistake was material. Therefore option (b) is correct and option (a) is incorrect.

Option (c) is incorrect as the error did not relate to Carol's reason for concluding the contract (Hutchison and Pretorius *Contract* 87).

Question 3

Assume the same facts as in question (2) and assume that Carol's error was material. Which statement(s) is/are **CORRECT**?

(a) Carol's error was a *iustus error*.

(b) Carol's error was not a *iustus error*.

(c) Carol misrepresented her intention to Jane by accepting Jane's offer.

(d) Carol by accepting Jane's offer, led Jane to reasonably believe that they have reached consensus.

1 (a).

2 (b).

3 (c) and (d).

4 (b) and (c).

5 (b), (c) and (d). (1)

Answer

5.

Discussion

The requirements of both *iustus error* and the doctrine of quasi mutual assent are relevant when answering this question.

A mistake is a *iustus error*, if it is both material and reasonable (Hutchison and Pretorius *Contract* 99). It has already been established from the previous answer that the error was material. The issue now is whether the mistake was also reasonable. In *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A), the court ruled under similar circumstances that the mistake by the contract denier was not reasonable (Hutchison and Pretorius *Contract* 98-99). The mistake furthermore does not fall into one of the recognised categories of reasonable mistakes (Hutchison and Pretorius *Contract* 100-103). Therefore option (b) is correct.

Option (c) and (d) relate to requirements of the doctrine of quasi-mutual assent (Hutchison and Pretorius *Contract* 95-97). This doctrine requires that the one party reasonably believes that the other party had agreed to enter into the contract and that this belief must have been caused by the latter party. Carol made a misrepresentation to Jane that she wanted to conclude a contract with Jane by accepting Jane's offer and this led Jane to reasonably believe that consensus had been reached between the parties. Therefore both options (c) and (d) are correct. See the application of the doctrine of quasi-mutual assent to the facts of *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A) by Hutchison and Pretorius *Contract* 106.

Question 4

Assume the same facts as in question (2). Which case has similar facts?

1 *National Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A).

2 *Brink v Humphries & Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA).

3 *George v Fairmead Hotel (Pty) Ltd* 1958 (2) SA 465 (A).

4 *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 893 (A).

5 *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 (4) SA 164 (D). (1)

Answer

1.

Discussion

See Hutchison and Pretorius *Contract* 98.

Question 5

Gary points a loaded gun at Pete, and orders him to sign a written contract. Gary explains that the document is for the sale of Pete's car to him (Gary), at a price of R50 000 which is far below the market value of the car. Pete, fearing for his life, signs the document. To establish a cause of action, which of the following is **NOT** necessary for Pete to prove?

1 That Pete had a reasonable fear.

2 That the threat weakened Pete's power of resistance and rendered his will compliant.

3 That there was a threat of an imminent evil.

4 That the threat was *contra bonos mores*.

5 That the pressure Gary used caused damage. (1)

Answer

2.

Discussion

The requirements for duress (Hutchison and Pretorius *Contract* 136-140) are relevant to this question, as it appears that Pete did not freely conclude the contract, but through fear for his life. Options 1, 3, 4 and 5 are all requirements that must be present to prove a cause of action based on duress (Hutchison and Pretorius *Contract* 137). Option 2 is not a requirement to prove duress. Instead it has a similar wording to a requirement, which is necessary to prove undue influence (Hutchison and Pretorius *Contract* 141-142).

Question 6

X has a watch that Y likes. X offers to sell her watch to Y for R1 000, and X and Y agree that X's offer will be open for acceptance until 1 June. This is a case ofa pre-emption formed unilaterally.

1 an option formed bilaterally.

2 an option formed unilaterally.

3 neither an option, nor a pre-emption.

4 a pre-emption formed bilaterally. (1)

Answer

2.

Discussion

From the facts of this problem it is clear that the parties have entered into an agreement to hold the offer open. All contracts are bilateral juristic acts (Hutchison and Pretorius *Contract* 6).

An option is a contract to keep an offer open for acceptance for a certain period of time (Eiselen GTS et al *Law of contract. Only study guide for PVL3702* (University of South Africa 2012) 26). Clearly there is an agreement between the parties to keep X's offer open for acceptance until 1 June. Therefore option 2 is correct.

In a pre-emption agreement the prospective seller undertakes to give a prospective buyer preference in the event of deciding to sell the property (Eiselen et al *Study Guide* 31). Clearly X and Y did not conclude such an agreement relating to the watch.

Question 7

X has a watch that Y likes. X offers to sell her watch to Y for R1 000, and Y accepts this offer. X and Y agree that they will reduce their contract to writing and that they will both sign it ("the writing clause"). The parties reduced their contract to writing, but failed to sign it. Which statement(s) is/are **CORRECT?**

1 The law presumes that the X and Y intended the writing clause to facilitate proof of the terms of their contract, because there is doubt about what the intended purpose of X and Y was with the inclusion of the writing clause in their contract.

2 There is no binding contract because the formalities created by X and Y were not complied with.

3 The writing clause also constitutes a non-variation clause.

4 A binding contract was concluded even though X and Y only partially complied with the writing clause.

5 Option 1 and 4. (1)

Answer

5.

Discussion

The question relates formalities stipulated by the parties (Hutchison and Pretorius *Contract* 164-165). X and Y partially failed to comply with their formalities. The purpose of the parties with regard to their formalities determines the consequences of their failure to comply. It is uncertain what the parties intended in our problem and is such a case the law presumes that their intention was merely to facilitate proof of the terms of their contract. This means that their oral contract was valid. Therefore option 1 is correct and option 2 is incorrect. Option 4 is also correct, because it does not matter whether the writing clause was not complied with partially, or in its entirety.

Option 3 is incorrect. The writing clause is not a non-variation clause, because it does not regulate the variation of the contract between X and Y. For a discussion on non-variation clauses see Hutchison and Pretorius *Contract* para 6.3.2.

Question 8

S negligently informs P that there are 1 000 fruit trees on his (S's) farm, as a result of which P buys the farm for R8 000 000. P pays the R8 000 000 and the farm is registered in her (P's) name. It is later found that there are only 800 fruit trees on the farm. P would not have bought the farm had she known the truth about the number of fruit trees, but decides nevertheless to uphold the contract. The value of the missing 200 fruit trees is R500 000. The market value of the farm is R7 800 000. The farm would have been worth R8 400 000 if it had 1 000 fruit trees on it. What amount will P be able to claim from S based on negligent misrepresentation? **Do not apply the Consumer Protection Act to this question.**

1 R0.

2 R200 000.

3 R400 000.

4 R500 000.

5 R600 000. (1)

Answer

2.

Discussion

Negligent misrepresentation is a delict and damages may be claimed for negligent misrepresentation in the same manner as damages for fraud (Hutchison and Pretorius *Contract* 131). The measure for damages for negligent misrepresentation is the usual delictual measure: the victim is entitled to be put in the financial position he/she would have been in had the delict (misrepresentation) not been committed against him/her (Hutchison and Pretorius *Contract* 126). P's damages will be calculated based on *dolus dans* (Hutchison and Pretorius *Contract* 127), because she would not have contracted at all had she known the truth about the number

of trees. P should thus be placed in the financial position that she would have been in had she not contracted at all. P would then have had the purchase price of R8 000 000. P, however, upholds the contract, and thus has a farm which is only worth R7 800 000. She thus suffers a loss of R200 000: R8 000 000 (the price) - R7 800 000 (the value of the farm = R200 000. Therefore option 2 is correct.

Question 9

P's claim against S in question (8) is based on

1 delict.

2 breach of contract.

3 unjustified enrichment.

4 monetary compensation.

5 all the above. (1)

Answer

1.

Discussion

Negligent misrepresentation is a delict (Hutchison and Pretorius *Contract* 129-131).

Question 10

Incidentalia are:

1 All the terms of a contract apart from the *naturalia* and *essentialia*.

2 Terms that identify a contract as belonging to a particular class of contracts.

3 Terms automatically imposed by law on the contracting parties unless contracting parties expressly exclude them.

4 All the terms of a contract apart from the *naturalia*.

5 All the material terms and conditions of a contract. (1)

Answer

1.

Discussion

See the description of *incidentialia* in Hutchison and Pretorius *Contract* 238.

Total: [10]

2016
Semester 2

1.1 Assignment 01

Question

S, who lives in Upington, sends P, who lives in Grahamstown, a letter by private courier in which she (S) offers to sell P her (S's) motorcycle, a collectors piece, for R100 000. She states in her letter that her offer will expire on 1 February. P accepts S's offer by letter which he posts on 31 January. S receives the letter on 7 February and only reads it on the next day. P tenders payment of R100 000 but S refuses to accept payment. Did a valid contract of sale arise between S and P? Advise P. Substantiate your answer. (10)

Identifying the problem

The question is whether P accepted S's offer in time and S and P thus reached consensus. To be more specific, the question relates to the legal rules pertaining to when and where the acceptance takes effect (Hutchison and Pretorius (eds) *The law of Contract in South Africa* Oxford University Press Southern Africa 2012 56-60).

Discussing the relevant law applicable to the problem *AND* applying the law to the facts of the problem

In our problem S made an offer to sell her motorcycle by letter delivered by a private courier. In this letter she stated that her offer will expire on 1 February. An offer which has a time limit for acceptance lapses automatically if it is not accepted within the prescribed period (Hutchison and Pretorius *Contract* 54). P accepted S's offer in a letter that he posted on the 31 January, but S only received the letter and read it after the due date for acceptance. The question is thus whether P validly accepted the offer on or before 1 February.

The general rule is that a contract only comes into being when the offeror knows that his/her offer has been accepted (Hutchison and Pretorius *Contract* 57). The theory which explains this rule is the information theory. This general rule gives effect to one of the requirements of subjective consensus (Hutchison and Pretorius *Contract* 13-14) which is the primary basis of contractual liability (Hutchison and Pretorius *Contract* 19). If we apply the general rule, it is clear the offer expired before acceptance.

But this is not the end of our enquiry because there are exceptions to the general rule (Hutchison and Pretorius *Contract* 57-59). The offeror as *dominus* may dispense with the need of acceptance being communicated to him /her or can indicate in the offer that the contract will come into being at an earlier stage. This may be expressly indicated in the offer itself, but this is not the case in our problem. It may also be implied from all the circumstances, the language of offer itself and the nature of the contract. Not one of these implied instances are possibly applicable on our facts. Where an offer is made through the post it is assumed (a legal fiction

thus) if certain the requirements are met that the offeror authorised acceptance by post as well

as indicated that the contract is concluded as soon as the acceptance is posted (*Kergeulan Sealing and Whaling Co v Commissioner of Inland Revenue* 1939 AD 487). The expedition theory explains the postal rule. The postal rule is, however, not applicable to our problem as the offer was not made by post.

As a consequence, the general rule must out of necessity apply: S had to be informed that her offer was accepted before the time of termination of her offer. S did not and her offer automatically lapsed and there was no offer left to be accepted when she read P's letter on 8 February and learned that her offer was accepted.

The giving of appropriate advice

No contract of sale came into being because P failed to accept S's offer timeously. S may thus validly refuse to accept P's performance in terms of an invalid contract.

General comments

Students were given credit for a discussion and application of the requirements for a valid offer and acceptance even if the facts of our problem in this regard are scarce.

Some students experienced difficulty in solving this problem. We have to think logically and systematically to solve this problem. We must also apply the following legal knowledge which we should have acquired by now.

We should firstly understand that the law often regulates a situation in a certain way and then creates exceptions to this the general rule. If one of the exceptions does not apply to a given set of facts, the general rule applies.

We have to secondly understand that theories try to explain what the law does and that they are not the law itself. In this problem we have different theories which explain when an acceptance has effect and a contract comes into being. So for instance, an offer by post does not mean that the expedition theory is authorised. No. The offeror is assumed to empower the addressee to accept the offer by post and to provide that the contract comes into being as soon as the letter of acceptance is posted. When we analyse this rule we can say that expedition theory applies. We must not confuse the law and our explanation of the law.

Total: [10]

1.2 Assignment 02

Question 1

Which statement is **INCORRECT**?

1 The obligations that arise from contract, delict, and unjustified enrichment, are always imposed by law, irrespective of the will of the parties.

2 The law of contract, delict, and unjustified enrichment, all relate to the law of obligations.

3 Breach of contract and a delict are very similar, in that they both constitute civil wrongs and, in appropriate circumstances, give rise to a duty to pay damages.

4 Sometimes, concurrent contractual and delictual liability can arise, so that the plaintiff may sue on either basis.

5 In the absence of a valid contract, an unjustified enrichment claim may arise when there is a transfer of wealth from one person's estate to another person's estate, without a good legal ground or cause for this shift. (1)

Answer

1.

Discussion

Options 2, 3, 4 and 5 are all correct (Hutchison and Pretorius (eds) *The law of Contract in South Africa* (Oxford University Press Southern Africa 2012) 8-9). Option 1 is incorrect (Hutchison and Pretorius *Contract* 8).

Question 2

S informs P in good faith that there are 1 000 fruit trees on his (S's) farm, as a result of which P buys the farm from S for R8 000 000. It is later found that there are only 800 fruit trees on the farm. This is a case of

1 an *error in corpore* based on the judgment in *Spenmac (Pty) Ltd v Tatrim CC* 2015 (3) SA 46 (SCA).

2 an *error in substantia* based on the judgment in *Trollip v Jordaan* 1961 (1) SA 238 (A).

3 an innocent misrepresentation.

4 an *error in negotio*.

5 option 1, 2 and 3. (1)

Answer

5.

Discussion

Both options 1 and 2 are correct (Paragraph 1.1 of Tutorial Letter 102 and Hutchison and Pretorius *Contract* 87 89). Option 3 is also correct (Hutchison and Pretorius *Contract* 116-117), because S made an innocent false statement which induced P to buy the farm.

The error P operated under does not relate to the true nature of the contract (*error in negotio*) as P wanted to buy the farm and the contract is indeed one of sale (Hutchison and Pretorius *Contract* 88). S also did not err with regard to the true nature of the contract. Option 4 is thus incorrect.

The distinction between error and misrepresentation has puzzled many a lawyer. The distinction lies therein that a misrepresentation that causes a material error should be categorized as an error, whereas a misrepresentation that causes a non-material error should be categorized as a misrepresentation. The *Spenmac* case has enormously complicated this distinction. We still regard the *Trollip* case as the correct approach. Study activity 5 of Study Unit 12 until you understand this distinction.

Question 3

X, an organiser of art exhibitions, contracted with Y for an exhibition to be held on 24 to 27 July. These dates were the only dates mentioned during the negotiations. After having been pressurized by X, Y hurriedly signed the standard form contract without reading it. The contract contained a clause permitting X to change the dates of the exhibition unilaterally. Thereafter X changed the dates. X had no reason to believe that Y would have signed the contract if he had known of the term. This is a case of

1 an *error in persona*.

2 a material error.

3 an *error in negotio*.

4 a common error.

5 option 2 and 3. (1)

Answer

2.

Discussion

When Y signed the contract, Y did not know of the presence of the clause that allows X to unilaterally change the dates of the exhibition. This is a material error on Y's part (Hutchison and Pretorius *Contract* 86), because it allows X to unilaterally change an aspect (the date) of X's performance. Option 2 is thus correct.

Neither X or Y operated under an error relating to the true nature of the contract (an *error in*

negotio) or to the identity of the other party (an *error in persona*). See Hutchison and Pretorius *Contract* 88. Options 1, 3 and 5 is thus incorrect.

A common mistake would be present if both X and Y made the same mistake (Hutchison and Pretorius *Contract* 83 108). Only Y was mistaken as to the presence of the clause, while X knew of the presence of the clause. Option 4 is thus also incorrect

Question 4

While Ann was sick in hospital, she sent for her neighbour, Jack. She was worried that she would not be able to cope with the running of her farm. She decided to offer her farm for sale to Jack as he had expressed an interest in buying her family farm to her father many years previously and she trusted him to look after the family graveyard. Jack agreed to buy the farm. She later signed the written contract of sale in the presence of Jack without reading it. Jack also signed the contract. To her horror she found out later that she had sold the farm to the Jack Trust and not to Jack personally. Jack, a trustee of the Jack Trust, signed the contract on behalf of the Jack Trust without telling her that he was not buying in his personal capacity. She furthermore did not know any of the other trustees and would never have signed the contract if she had known that the purchaser was not Jack. What form of mistake does Ann labour under?

1 Mistake regarding the motive for concluding the contract.

2 Mistake regarding the true nature of the contract.

3 Common mistake.

4 Mistake regarding the identity of the subject matter of the contract.

5 Mistake regarding the identity of the other contracting party. (1)

Answer

5.

Discussion

In this problem Ann's mistake related to the identity of the other party with whom she is contracting. She wanted to sell her farm to Jack, not to the trust. This is an *error in persona* (Hutchison and Pretorius *Contract* 86, 88). Option 5 is thus correct.

Ann's motive for selling made her *error in persona* material, because it is clear that she wanted to sell only to a specific person. Her error was not a mere mistake in motive (Hutchison and Pretorius *Contract* 87). Option 1 is thus incorrect.

Option 2 is also incorrect. Ann was not mistaken regarding the true nature of the contract, because she wanted to sell her farm and the contract she signed is indeed a contract of sale (Hutchison and Pretorius *Contract* 88).

Ann wanted to sell her farm. She thus made no mistake as to the identity of the subject matter of the contract of sale (the farm). See Hutchison and Pretorius *Contract* 86 87. Option 4 is

therefore incorrect.

Ann thought she was contracting with Jack, but Jack Trust wanted to contract in its own name. There was thus no common mistake regarding who the parties were going to be and option 3 is incorrect. See Hutchison and Pretorius *Contract* 83 108.

Question 5

Gary points a loaded gun at Pete, and orders him to sign a written contract. Gary explains that the document is for the sale of Pete's car to him (Gary), at a price of R50 000 which is far below the market value of the car. Pete, fearing for his life, signs the document. If Pete proves the relevant cause of action, the contract between Gary and Pete is

1 void at the instance of Pete.

2 void at the instance of both Gary and Pete.

3 voidable at the instance of Pete.

4 voidable at the instance of both Gary and Pete.

5 neither void nor voidable, but unenforceable. (1)

Answer

3.

Discussion

All the requirements for duress (Hutchison and Pretorius *Contract* 136-140) are present in this problem as Pete did not freely conclude the contract, but through fear for his life. The question is which option embodies the correct consequence of duress (Hutchison and Pretorius *Contract* 136-137). It is important to note that the contract is valid, but that the prejudiced party has the choice to have the contract set aside. Option 3 is thus correct and options 4 and 5 are incorrect.

The contract will only be void if one of the requirements for a valid contract (Hutchison and Pretorius *Contract* 6) is absent. Consensus is present, but it has been obtained in an improper manner by means of duress. That makes the contract valid, but voidable. Options 1 and 2 are thus incorrect.

Question 6

X has a watch that Y likes. X and Y agree that if X ever sells her watch, she will offer to sell it first to Y for R5 000. This is a case of

1 a pre-emption formed unilaterally.

2 an option formed bilaterally.

3 an option formed unilaterally.

4 both an option and a pre-emption.

5 a pre-emption formed bilaterally. (1)

Answer

5.

Discussion

X and Y have concluded an agreement. All agreements are necessarily bilateral or even multilateral (Hutchison and Pretorius *Contract* 6). Here we have two parties and their contract is thus bilateral. Options 1 and 3 are thus incorrect. Only options 2 and 5 can possibly be correct.

An option is a contract to keep an offer open for acceptance for a certain period of time (Eiselen GTS et al *Law of contract. Only study guide for PVL3702* (University of South Africa 2012) Eiselen et al *Study Guide* 26). Clearly X and Y did not conclude such an agreement relating to the watch. Options 2, 3 and 4 are thus incorrect.

This leaves only option 5 as a possible correct option. In a pre-emption agreement the prospective seller undertakes to give a prospective buyer preference in the event of deciding to sell the property (Eiselen et al *Study Guide* 31). X granted Y such a right of pre-emption in their agreement which was bilateral.

Question 7

S sold a second-hand tractor to P for R60 000. The maximum price for the tractor under the relevant price control regulations was R40 000. The price control regulation prohibited the conclusion of contracts of sale at a price in excess of the controlled price and provided that such contracts were void. P was aware of the price control regulation, but S was not. S delivers the tractor, but P refuses to pay the purchase price. Which statement is **CORRECT**?

1 P has to pay S R40 000, because P would otherwise unjustifiably be enriched at the expense of S.

2 S may cancel the contract and claim back the tractor from P.

3 S may claim delictual damages from P, because P has refused pay the purchase price.

4 S may claim back the tractor from P with an unjustified enrichment action.

5 S may not claim the tractor back from P, because the *in pari delicto* rule prohibits S from doing so. (1)

Answer

4.

Discussion

Legislation prohibits the conclusion of the parties' contract and even determines that such

contract is void (Hutchison and Pretorius *Contract* 181-182). This problem relates to the consequences of an illegal contract that has partially been performed (Hutchison and Pretorius *Contract* 190-192). The tractor has been delivered but the price has not been paid.

As the contract is void the contract of sale cannot be enforced according to the *ex turpi* rule. Consequently S cannot claim the purchase price from P. There is simply no contract that can be enforced. Also, P cannot cancel the contract, because there is no contract to cancel. Consequently, option 2 is incorrect.

The tractor was delivered to P and ownership usually passes to P because the real agreement (Hutchison and Pretorius *Contract* 4-5) is valid. P is thus unjustifiably enriched with the tractor at the expense of S. because a valid causa (the agreement that creates obligations; that is the contract of sale) is absent for this transfer of ownership. S can thus institute a claim for enrichment against P for redelivery of the tractor. Option 4 could thus be correct. P is not enriched with the purchase price. Option 1 is incorrect.

Please note: This contract of sale is in fact a cash sale (delivery and payment has to occur at the same time) This sale is not a credit sale in which the seller has given credit to the purchaser and the purchase price may be paid after delivery of the thing sold. In such a case, ownership will not pass to the purchaser unless payment of the price is made simultaneous with delivery of the tractor. See in the regard the module on Sale and Lease. You are not supposed to know this at this stage. Hence the question has been formulated as if enrichment had occurred.

The *par delictum* rule can prohibit S from instituting an enrichment action, but this rule will not apply in this case as S was not equally "guilty": S did not know that their contract was illegal. Option 4 is thus correct and option 5 incorrect. Only if S knew that their contract was illegal would he/she have been *in pari delicto.* Then only would the question arise whether this rule can be relaxed and the enrichment action allowed.

S can only claim delictual damages if P committed a delict by failing to perform. Failure to perform is usually only just a breach of contract which could give rise to a claim for contractual damages. See Hutchison and Pretorius *Contract* 8-9. Option 3 is thus incorrect.

Question 8

Which one of the following contractual terms is certain?

1 X undertakes to pay a substantial amount of the purchase price of R600 000 for a house each month until the price is paid off.

2 Y will pay X a reasonable fee for the installation of Y's stove.

3 X has an option to buy Y's farm for a price to be determined by agreement between X and Y. X and Y undertake to negotiate the price in good faith when X exercises the option.

4 X, the seller of a car to Y, will determine the purchase price of his car.

5 X has an option to buy Y's farm for a price to be determined by agreement between X and Y when X exercises the option. (1)

Answer

2.

Discussion

Only option 2 is certain (Hutchison and Pretorius *Contract* 214). All the others, option 1 (Hutchison and Pretorius *Contract* 213), option 3 (Hutchison and Pretorius *Contract* 212), option 4 (Hutchison and Pretorius *Contract* 214) and option 5 (Hutchison and Pretorius *Contract* 212), are not.

Question 9

Which one of the following statements regarding tacit terms is **INCORRECT**?

1 The courts often employ the officious bystander test in determining whether a contract contains a tacit term.

2 A tacit term will only be read into a contract if it does not conflict any of the unambiguous express terms of the contract.

3 A tacit term will only be read into a contract if it is necessary in a business sense to give efficacy to the contract.

4 Trade usage is a fertile field for the importation of tacit terms.

5 A tacit term must be capable of a reasonably clear and reasonably exact formulation. (1)

Answer

5.

Discussion

Option 5 is incorrect. A tacit term has to be capable of clear and exact formulation (Hutchison and Pretorius *Contract* 248). The rest is correct (Hutchison and Pretorius *Contract* 247-248).

Question 10

S undertakes to transfer (deliver) his car to P for R40 000 on 1 July. They agree that the car has to be delivered to P on 2 July, but they fail to agree on a date on which P has to pay S R40 000. S guarantees that the car is a 2005 model. Which statement regarding this contract is **INCORRECT**?

1 The obligations to deliver the car and to pay R40 000 characterises this contract as a contract of sale.

2 The obligation to deliver the car and to pay R40 000 are the *essentialia* in this contract.

3 The obligations of the parties (delivery of car and payment of R40 000) are reciprocal.

4 The obligation to deliver the car on 2 July is one of the *incidentalia* in this contract.

5 This contract has no *naturalia*. (1)

Answer

5.

Discussion

The obligation to deliver a car for a sum of money characterises this contract as one of sale. These two obligations form the *essentialia* of a contract of sale (Hutchison and Pretorius *Contract* 237). Options 1 and 2 are therefore correct. The obligation to deliver the car on 2 July is an *incidentalia* because it is a term which is not an *essentialia* or *naturalia* (Hutchison and Pretorius *Contract* 238). Option 3 is thus correct.

A contract of sale has many *naturalia* (Hutchison and Pretorius *Contract* 237) and option 5 is thus incorrect.

Option 3 is correct (Hutchison and Pretorius *Contract* 7 235 237), because delivery of the car is in exchange for the price. **Please take note:** Reciprocity is of importance to determine whether the exceptio non adimpleti contractus may be raised as defence (Hutchison and Pretorius *Contract* 317).

2015
Semester 1

1.1 Assignment 01

Question

John, a racehorse owner, advertises for sale the horse Fire for R1.5 million. In the advertisement it is stated that Fire is an offspring of the legendary July winner, Lightning. Peter is a horse breeder who specifically wishes to introduce the bloodline of Lightning into his stud. He agrees orally with John to buy Fire for R1.5 million. Later, in order to meet the requirements of the horse breeders' association, John has a written contract drawn up which Peter signs without reading. The contract makes no mention of Fire's ancestry, but does contain a clause exempting John from liability for any representations made during negotiations or in the contract. Peter's attention is not drawn to these facts. A month later Peter finds out that Fire is in fact not an offspring of Lightning, although at the time of the conclusion of the contract John genuinely and without any fault on his part believed that to be the case. Advise Peter on whether the contract of sale is valid. Substantiate your advice and refer to relevant case law. Apply the **subjective approach** of the courts in answering this question. **Do not apply the Consumer Protection Act to this question.** (10)

Answer

Identifying the problem

The subjective approach of the courts involves the application of the will theory as qualified by estoppel or quasi-mutual assent (Hutchison and Pretorius (eds) *The law of Contract in South Africa* Oxford University Press Southern Africa 2012 90-97). A successful reliance on estoppel can only give rise to a 'fictional' (thus not valid) contract (Hutchison and Pretorius *Contract* 94) and will thus not be discussed.

The facts seemingly indicate that John and Peter have not reached consensus based on the will theory. If that is the case, it is necessary to determine if Peter may be held bound to a contract with John, based on the reliance theory.

Discussing the relevant law applicable to the problem *AND* applying the law to the facts of the problem

The subjective approach implies that we first have to determine whether agreement between the parties exists as required in terms of the will theory or whether a party acted under a material mistake. Consensus has three elements (Hutchison and Pretorius *Contract* 14 85): the parties must seriously intend to contract, be of one mind as to the material aspects of the proposed agreement (the terms and the identity of the parties to it), and be conscious of the fact that their minds have met.

In the present case the innocent misrepresentation regarding Fire's lineage is irrelevant because it caused a non-material mistake: a mistake regarding a characteristic (the lineage) of the thing sold, Fire (an *error in substantia*). The parties wanted to buy and sell the same horse, Fire. See Eiselen GTS *et al Law of contract Only study guide for 3702* Unisa 2012 40: Hutchison and Pretorius *Contract* 88-89.

The parties were, however, not in agreement as to the consequences they wished to create: Peter did not know that there was a clause in the contract he signed exempting John from liability for any representations made during negotiations or in the contract, but John knew that the sale included an exemption clause. Peter made a mistake as to the obligations the parties wished to create which excludes *consensus* between the parties (Hutchison and Pretorius *Contract* 86). No contract can thus arise on the basis of the will theory.

The facts of our problem are very similar to that in *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 889 (A) where the appellant signed an agreement without reading it which contained a term excluding the respondent's liability for misrepresentation. The court held that the mistake regarding the exemption clause was material.

This type of mistake also occurred in other cases. In *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 (4) SA 164 (D) the plaintiff believed that he was purchasing the erf shown to him by the seller's agent, while the written contract that he signed indicated the correct erf which was a completely different property. His mistake related to performance and was material. In *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (2) SA 234 (A) the appellant erred with regard the period of the lease which was an aspect of the performance.

A valid contract could still arise in terms of the doctrine of quasi-mutual assent or direct reliance theory (Hutchison and Pretorius *Contract* 95-97 103-105). The court stated the test in *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (2) SA 234 (A) 239-240 as follows:

> In my view, therefore, the decisive question in a case like the present is this: did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention? … To answer this question, a three-fold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party's intention; secondly, who made that representation; and thirdly, was the other party misled thereby? … The last question postulates two possibilities: Was he actually misled and would a reasonable man have been misled?

One of the parties to the contract, Peter, misrepresented his intention to be bound by the contract by signing the contract. Although it could be argued that John was actually misled by this misrepresentation of Peter, it is clear that a reasonable person in the position of John would not have been misled thereby. John knew in fact that there was no exemption clause in the oral contract while the written contract had such a clause. John should have realised that Peter could have thought that the written contract was also without such a clause and he thus had a legal duty to point out to Peter the presence of this clause in the written contract. There was either no actual or at least reasonable reliance on the part of John.

The giving of appropriate advice

The written contract of sale is invalid because of the lack of actual and apparent consensus.

Total: [10]

1.2 Assignment 02

Question 1

Which concept is **NOT** a value that informs the law of contract?

1 Freedom of contract.

2 Good faith.

3 Privity of contract.

4 The requirement that a contract must not be against public policy.

5 *Pacta sunt servanda*. (1)

Answer

4**.**

Discussion

There are a number of values that inform the rules of the law of contract. Option 1, 2, 3 and 5 are such values. The requirement that a contract must not be against public policy, is not a value that informs the law of contract. It is a legal requirement for a valid contract and a legal rule thus. See Hutchison and Pretorius (eds) *The law of Contract in South Africa* Oxford University Press Southern Africa 2012 21-26.

Question 2

Which statement is **CORRECT** regarding unlawful contracts?

1 All unlawful contracts are void.

2 Some contracts that have been criminalized by statute are not void.

3 Some unlawful contracts are unenforceable in terms of the *in pari delicto potior condicio possidentis* rule.

4 All unlawful contracts are voidable.

5 All contracts that are prohibited by statute in order to protect the revenue of the state are void. (1)

Answer

2.

Discussion

The fact that a contract has been criminalized is an indication that the contract is void, but not where the sanction is adequate protection against the harm the act intends preventing (Hutchison and Pretorius *Contract* 182). Option 2 is thus correct.

Some illegal contracts are not invalid, but only unenforceable (Hutchison and Pretorius *Contract* 176 192-3). Option 1 is thus incorrect.

Option 3 is also incorrect, since the *in pari delicto potior condicio possidentis* rule does not prohibit the enforcement of unlawful contracts, but prevents a party from reclaiming his or her performance which has been made in terms of an unlawful contract (Hutchison and Pretorius *Contract* 191).

Option 4 is incorrect, because the consequences of illegality are either that the contract is void, or valid but unenforceable (Hutchison and Pretorius *Contract* 176 192-3).

Option 5 is also incorrect, because contracts which are prohibited by statute to protect the revenue of the state are valid. (Hutchison and Pretorius *Contract* 182).

Question 3

X makes an offer to Y to purchase Y's car. X sends the offer by e-mail to Y. Y reads the offer on 13 May and drafts a written acceptance on 14 May. Y posts his acceptance on 15 May to X. X receives the acceptance on 17 May in his post-box and reads it on 18 May. When was the contract concluded?

1 13 May.

2 14 May.

3 15 May.

4 17 May.

5 18 May. (1)

Answer

5.

Discussion

The information theory is the general rule in our law and states that the contract is concluded when and where the offeror learns or is informed of the acceptance of his or her offer. The offeror may determine expressly or tacitly otherwise in the offer. In postal contracts the expedition theory applies and the contract is concluded as soon as the acceptance has been posted. The law assumes (a fiction thus) from the making of an offer by post that thus) the offeror has authorised acceptance by post, and also to has waived the requirement of notification of acceptance. Here the offer was not send by post, but by e-mail. Thus the general rule applies and the contract is concluded as soon as the offeror, X, reads the acceptance. See the discussion in Hutchison and Pretorius *Contract* 56 – 60.

Question 4

In a contractual context, where the debtors are jointly liable only, and the co-creditors may only claim performance jointly, this is a case of

1 proportionate liability.

2 simple joint liability.

3 *in solidum* liability.

4 joint and several liability.

5 collective joint liability. (1)

Answer

5.

Discussion

Option 5 is correct. Collective joint liability occurs where co-debtors are liable to make a performance jointly as a collective, and the co-creditors may only claim performance jointly (Hutchison and Pretorius *Contract* 222).

The others options are incorrect (Hutchison and Pretorius *Contract* 220-222).

Question 5

Which statement regarding the interpretation of contracts is **INCORRECT**?

1 The parol evidence rule has an integration and interpretation aspect.

2 The distinction between background and surrounding circumstances is imprecise.

3 The primary rule is to give effect to the intention of the party who drafted the contract.

4 Where a term is ambiguous it should be interpreted against the party who proposed it.

5 Where a term is ambiguous it should be given a meaning that makes it legally effective. (1)

Answer

3.

Discussion

Only option 3 is incorrect. The primary rule in the interpretation of contracts is to give effect to the common intention of the parties who entered into the contract and not the intention of the person who drafted the contract (Hutchison and Pretorius *Contract* 255–256). The other options are all correct (Hutchison and Pretorius *Contract* 258 261 267 and 268).

Question 6

X and Y agree that should X sell her leather couch, she (X) will offer to sell it to Y first, before making an offer to sell the couch to any other person. X sells the couch to Z for R10 000 without first offering it to Y for sale. Delivery of the couch has not yet taken place. Which statement is **CORRECT**?

1 X and Y concluded an option contract.

2 The contract between X and Z is voidable, because it breaches the contract between X and Y.

3 Y has a personal right against X, but Z has a real right against X.

4 Both Y and Z only have personal rights against X.

5 The personal right of Z enjoys preference above the personal right of Y, because it arises from a contract of sale. (1)

Answer

4.

Discussion

The contract between X and Y is a pre-emption agreement and not an option contract, because an existing offer is not kept open by agreement (Eiselen GTS *et al Law of contract Only study guide for 3702* Unisa 2012 26). Option 1 is thus incorrect.

Option 2 is incorrect because the mere fact that the contract between X and Z breaches another contract does not make it voidable. Only personal rights arise from a right of pre-emption (Eiselen *et al Study guide* 32-33). Option 1 is thus incorrect.

Y indeed has a personal right against X in terms of the right of pre-emption, but so does Z, because delivery of the couch has not yet taken place. If delivery had taken place Z would have a real right because delivery to Z renders Z the owner and a real right enjoys preference over personal right. Options 3 and 5 are thus incorrect, while option 4 is correct. See Eiselen *et al Study guide* 35-37.

Question 7

Assume the same facts as in question (6). What remedy does Y have against X?

1 An interdict.

2 A claim for damages.

3 A claim for specific performance of the contract of sale after Y has stepped into Z's shoes with a unilateral declaration of intent made to X.

4 All the above remedies.

5 None of the above remedies. (1)

Answer

4.

Discussion

Options 1 to 3 are all remedies for breach of a right of pre-emption (Eiselen *et al Study guide 33* 35-36). Option 4 is thus correct.

Question 8

Essentialia are:

1 All the terms of a contract apart from the *naturalia*.

2 Terms that identify a contract as belonging to a particular class of contracts.

3 Terms automatically imposed by law on the contracting parties unless contracting parties expressly exclude them.

4 All the terms of a contract apart from the *incidentalia*.

5 Material terms and conditions of a contract. (1)

Answer

2.

Discussion

There are three types of terms in a contract: *essentialia*, *naturalia* and *incidentalia* (Hutchison and Pretorius *Contract* 237-238). Options 1 and 4 are thus incorrect.

Option 2 is correct because *essentialia* are terms that identify a contract as belonging to a particular class of contracts (Hutchison and Pretorius *Contract* 237).

Option 3 comprises a description of *naturalia* (Hutchison and Pretorius *Contract* 237) and is thus incorrect.

Option 5 is incorrect because material terms and conditions have nothing to do with *essentialia*. The breach of a material term gives the aggrieved party the right to cancel the contract (Hutchison and Pretorius *Contract* 248). "Conditions" are sometimes used as a synonym for the contractual terms, but they are more accurately terms that express the parties agreement on what is to happen to the obligations in the contract on the occurrence of an uncertain future event (Hutchison and Pretorius *Contract* 249).

Question 9

Y purchased from Z a specific painting for R150 000. At the time of contracting Y honestly believed it to be an original Da Vinci painting, but Z did not know of Y's belief. The painting was later found to be a copy. Y argues that the contract is void whilst Z maintains that the contract is valid. Which answer reflects the **CORRECT** legal position?

1 The contract is valid, because Y's mistake regarding the painting is only an error in motive.

2 The contract is void, because Y and Z acted under a common error regarding the painting.

3 The contract is void, because of Y's unilateral mistake regarding the painting.

4 The contract is void, because Y's mistake regarding the painting is an *error in corpore*.

5 The contract is void, because of Y's supposition regarding the painting. (1)

Answer

1.

Discussion

Y's mistake regarding the painting is not material because the parties wanted to buy and sell the same painting and Y's error relates to a characteristic of the thing sold (*error in substantia*) (Eiselen *et al Study guide* 40; Hutchison and Pretorius *Contract* 88-89). This makes Y's mistake an error in motive and the contract valid. Option 1 is thus correct.

Option 2 is incorrect as only Y erred and not both Y and Z (Hutchison and Pretorius *Contract* 108).

Option 3 incorrect, because this is not an unilateral mistake. Although there is an error on Y's part, Z did not know of Y's mistaken belief (Hutchison and Pretorius *Contract* 82).

Option 4 is incorrect, because Y's mistake is not an *error in corpore* (mistake concerning the subject matter of the contract), but an *error in substantia* (mistake concerning a characteristic of the of the subject matter) (Eiselen *et al Study guide* 40; Hutchison and Pretorius *Contract* 87-88 88-89).

Option 5 is incorrect because only Y acted under a supposition and the contract was not subject to a supposition (Hutchison and Pretorius *Contract* 108 252).

Question 10

X, an organiser of art exhibitions, contracted with Y for an exhibition to be held on 24 to 27 July. These dates were the only dates mentioned during the negotiations. After having been pressurized by X, Y hurriedly signed the standard form contract without reading it. The contract contained a clause permitting X to change the dates of the exhibition unilaterally. Thereafter X changed the dates. X had no reason to believe that Y would have signed the contract if he had known of the term. Which statement(s) is / are **INCORRECT**?

1 Y can cancel the contract because of her material mistake with regard to the presence of a clause in the standard form contract allowing X to unilaterally change the dates of the exhibition.

2 Y can prove that a contract with X exists without the clause in the standard form contract allowing X to unilaterally change the dates of the exhibition.

3 Y can use the *iustus error* approach to prove that a contract with X exists without the clause allowing X to unilaterally change the dates of the exhibition.

4 Option 1 and 3.

5 Option 1, 2 and 3. (1)

Answer

4.

Discussion

Option 1 is incorrect, because a material error renders the contract void. Cancellation presupposes a valid contract initially (Hutchison and Pretorius *Contract* 84). Option 3 is also incorrect, because the *iustus error* approach can only be used to prove that the contract between X and Y is void and not that a contract exists between X and Y without the clause allowing a unilateral change of the date (Hutchison and Pretorius *Contract* 99-100).

Option 2 is correct. It is clear that the written contract is void because of lack of subjective consensus or quasi mutual assent if we apply the *iustus error* approach (Hutchison and Pretorius *Contract* 85-87 97-103). Y's error with regard to the presence of the clause allowing X to unilaterally change the dates of the exhibition was material, because the error related to the legal consequences of the contract. Y's mistake is also reasonable in the circumstances, because X caused it with a misrepresentation by omission. The fact that 24 to 27 July were the only dates which were mentioned during the negotiations created the impression in Y's mind that these dates were fixed. X pressurized Y into signing, thereby preventing Y from reading the contract. X had furthermore no reason to believe that Y would have signed the contract if she (Y) knew of the presence of clause in the written contract. Indeed, X had a duty to inform Y of the presence of the clause in the written contract.

X can prove with the direct reliance theory (Hutchison and Pretorius *Contract* 95-97 103-105) that a contract exists with 24 to 27 July as dates for the exhibition. The only dates for the exhibition which were mentioned during the negotiations were 24 to 27 July and X failed to inform Y of the existence of the clause. X thereby made a misrepresentation to Y that he (X) wanted to conclude a contract where the dates of the exhibition were 24 to 27 July. Y was

indeed misled by this misrepresentation because she did not know of the clause (she did not read the written contract). A reasonable person in Y's position would also have been misled thereby because X's pressure on Y to sign the contract would also impede a reasonable person from reading the contract.

Total: [10]

2015
Semester 2

1.1 Assignment 01

Question

John, a racehorse owner, advertises for sale the horse Fire for R1.5 million. In the advertisement it is stated that Fire is an offspring of the legendary July winner, Lightning. Peter is a horse breeder who specifically wishes to introduce the bloodline of Lightning into his stud. He agrees orally with John to buy Fire for R1.5 million. Later, in order to meet the requirements of the horse breeders' association, John has a written contract drawn up which Peter signs without reading. The contract makes no mention of Fire's ancestry, but does contain a clause exempting John from liability for any representations made during negotiations or in the contract. Peter's attention is not drawn to these facts. A month later Peter finds out that Fire is in fact not an offspring of Lightning, although at the time of the conclusion of the contract John genuinely and without any fault on his part believed that to be the case. Advise Peter on whether the contract of sale is valid. Substantiate your advice and refer to relevant case law. Apply the **objective approach** of the courts in answering this question. **Do not apply the Consumer Protection Act to this question.** (10)

Answer

Identifying the problem

The facts indicate that even though John and Peter have apparently reached consensus (there is a written contract) they may not have reached consensus based on the will theory, because Peter signed the contract without reading it. Peter also thought the horse was an offspring of Lightning. The question thus deals with error.

A further clue is to be found in the direction to apply the objective approach. The objective approach of the courts involves the application of declaration theory as qualified by the *iustus error* doctrine (Hutchison and Pretorius (eds) *The law of Contract in South Africa* Oxford University Press Southern Africa 2012 97-103). This question thus deals with error.

Discussing the relevant law applicable to the problem *AND* applying the law to the facts of the problem

John and Peter have reached consensus according to the declaration theory. There is a signed contract of sale which indicates that their declared intentions have concurred. The *iustus error* doctrine now has to be applied because it qualifies the declaration theory. Peter erred with regard to Fire's lineage and the presence of the exemption clause in the written contract of sale. Peter who acted under a mistake and wishes to escape liability must prove that his mistake was material and reasonable in terms of *iustus error* doctrine.

The error regarding Fire's lineage is a non-material mistake is a mistake regarding a characteristic (the lineage) of the thing sold, Fire (an *error in substantia*). The parties wanted to buy and sell the same horse, Fire. See Eiselen GTS *et al Law of contract Only study guide for 3702* Unisa 2012 40: Hutchison and Pretorius *Contract* 88-89.

The parties were, however, not in agreement as to the legal consequences they wished to create: Peter did not know that there was an exemption clause in the contract he signed, but John knew there was. Peter thus made a mistake as to the obligations the parties wished to create which excludes *consensus* between the parties (Hutchison and Pretorius *Contract* 86). There was thus no actual consensus.

The facts of our problem are very similar to that in *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 889 (A) where the appellant signed an agreement without reading it. The contract contained a term excluding the respondent's liability for misrepresentation. The court held that the mistake regarding the exemption clause was material.

This type of mistake also occurred in other cases. In *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 (4) SA 164 (D) the plaintiff believed that he was purchasing the erf shown to him by the seller's agent, while the written contract that he signed indicated the correct erf which was a completely different property. His mistake related to performance and was material. In *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (2) SA 234 (A) the appellant erred with regard the period of the lease which was an aspect of the performance.

However, the matter does not end here, because Y still has to prove that his mistake was reasonable. This aspect of *iustus error* is an indirect application of the reliance theory. A mistake will inter alia be reasonable (Hutchison and Pretorius *Contract* 100-103) where the mistake was caused by a misrepresentation on the part of the contract assertor (John). Fault is not a requirement for this misrepresentation, but wrongfulness is.

Here John failed to remove the incorrect impression that Peter had that the written contract did not include an exemption clause. Such an *ommissio* will only be wrongful if John (the contract enforcer) had a legal duty in the circumstances to speak to remove the incorrect impression. Such a duty will exist where the contract assertor, before the conclusion of the contract, created an impression which is in direct conflict with the agreement he or she seeks to enforce (Hutchison and Pretorius *Contract* 101-102). Under these circumstances, the contract assertor must draw the contract denier's attention to this discrepancy (Hutchison and Pretorius *Contract* 101-102).

Du Toit v Atkinson's Motors Bpk 1985 (2) SA 889 (A) contained a similar factual setting to this assignment question. The Appellate Division reasoned (906) that by not saying anything about the exemption clause, the contract assertor created the impression that the signed document did not contradict the advertisement. The contract assertor misled the contract denier regarding the contents of the contractual document by way of omission which rendered the contract deniers mistake reasonable.

Peter's mistake was thus reasonable as John failed to bring to his (Peter's) attention that the oral contract arising from the advertisement, differed from the signed document which included an exemption clause. There was thus no apparent consensus.

The giving of appropriate advice

The written contract of sale is invalid because Peter's mistake was both material and reasonable and both actual and apparent consensus lacked.

1.2 Assignment 02

Question 1

In case law the Constitution has already impacted on the law of contract in the following ways:

1 Some High Courts have reversed the onus which rests on contract denier to prove that an agreement in restraint of trade is against public policy to the position before *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A).

2 In ascertaining whether the exercise of contractual powers is against public policy, public policy has been determined with reference to the fundamental values embodied in the Constitution.

3 In ascertaining whether a contractual term is contrary to public policy, public policy has been determined with reference to a fundamental value embodied in the Constitution.

4 2 and 3.

5 1, 2 and 3. (1)

Answer
5.

Discussion

Options 1, 2 and 3 are all correct. For option 1 see Hutchison and Pretorius (eds) *The law of Contract in South Africa* Oxford University Press Southern Africa 2012 196. For options 2 and 3 see Hutchison and Pretorius *Contract* 37-38.

Question 2

Inequality of bargaining power between the parties is taken into account as such to determine if

1 a contract is illegal.

2 undue influence has taken place.

3 duress has taken place.

4 1 and 2.

5 1, 2 and 3. (1)

Answer
1.

Discussion

A contract is illegal if the contract is contrary to public policy. The issue of the equal bargaining power of the parties at the time of contracting is a recognised public interest and is a factor taken into account to determine if a contract is contrary to public policy (Hutchison and Pretorius *Contract* 176 179). Option 1 is thus correct.

Options 2 and 3 deal with instances where consensus has been improperly obtained through undue influence and duress does not relate directly to the bargaining powers of the parties. It is not a requirement to prove inequality of the bargaining powers between the parties, in order to establish the presence of duress or undue influence. See Hutchison and Pretorius *Contract* para 4.3 and 4.4 for a discussion on duress and undue influence respectively). Options 2 and 3 are therefore incorrect.

Question 3

X makes a written offer to Y to purchase Y's house. X sends the offer by post to Y. Y reads the offer on 13 May and drafts an acceptance on 14 May. Y posts his acceptance on 15 May to X. X receives the acceptance on 17 May and reads it on 18 May. When was the contract concluded?

1 13 May.

2 14 May.

3 15 May.

4 17 May.

5 18 May. (1)

Answer
3.

Discussion

The information theory is the general rule in our law and states that the contract is concluded when and where the offeror learns or is informed of the acceptance of his or her offer. The offeror may determine expressly or tacitly otherwise in the offer. In postal contracts the expedition theory applies and the contract is concluded as soon as the acceptance has been posted. The law assumes (a fiction thus) from the making of an offer by post that the offeror has authorised acceptance by post, and that he or she also has waived the requirement of notification of acceptance. See the discussion in Hutchison and Pretorius *Contract* 56 – 60.

Here the offer by X was sent by post and the expedition theory thus applies. The contract was thus concluded on the date Y posted his acceptance, which is 15 May 2015.

Question 4

An option requires that it has to be exercised before a certain date. What is / are the legal consequence(s) before it is exercised?

1 The substantive offer in the option cannot be validly revoked.

2 If the grantee dies, the option can always be exercised.

3 If the grantor dies, the option can always be exercised.

4 The grantee can always cede his right to exercise the option to a third party.

5 All of the above. (1)

Answer
1.

Discussion

Option 1 is correct. An option is a binding agreement to keep an offer open for a certain period of time. The effect of this is that the offer is irrevocable for that period (Hutchison and Pretorius *Contract* 62).

Options 2 and 3 are incorrect. In principle, the death of either party does not put an end to the option. However, the option contract may validly stipulate either expressly or by implication that the death of the grantee or grantor will terminate the option (Hutchison and Pretorius *Contract* 66). Therefore the option cannot *always* be exercised when the grantor or grantee dies.

Option 4 is also incorrect. The general rule is that personal rights may be freely transferred by cession, unless the option contract expressly or by implication states the contrary (Hutchison and Pretorius *Contract* 66-67). This means that the grantee cannot *always* cede this right to a third party.

Question 5

X sells his car to Y. X fraudulently misrepresents the year model of his car to Y during the course of their negotiations. X's misrepresentation caused Y to agree to pay R220 000 for the car, instead of the R180 000 she would have offered to pay. Y will most probably be able to rescind the contract, because X made a(n)

(a) innocent misrepresentation.

(b) *dictum et promissum*.

(c) fraudulent misrepresentation.

1 (a).

2 (c).

3 (a) and (b).

4 (a) and (c).

5 None of the options. (1)

Answer
5.

Discussion

The law draws a distinction between two types of fraud, *dolus dans* and *dolus incidens*. It is a case of *dolus dans* if the defrauded party would not have contracted at all if it was not for the fraud (if the truth was known to him of her) and *dolus incidens* if the defrauded party would still have contracted but on other terms. The facts of this question indicate that this is a case of *dolus incidens*: Y would have still bought the car if she knew the truth but she would have paid less. It is uncertain at present whether the defrauded party may rescind the contract in the case of *dolus incidens,* because there are *dicta* in the case law for and against. There has been no decision yet in this regard and the position with regard to negligent and innocent misrepresentation will most probably follow the position with regard to fraud. Thus Y will most probably not be able to cancel the contract on the basis of fraudulent and innocent misrepresentation. See Hutchison and Pretorius *Contract* 123.

The contract can be cancelled based on a *dictum et promissum* only if the misled party would never had bought (Hutchison and Pretorius *Contract* 133) and furthermore a *dictum et promissum* is only mentioned together with innocent misrepresentation as option 3.

Option 5 is thus the only correct answer.

Question 6

X sells his car to Y. X fraudulently misrepresents the year model of his car to Y during the course of their negotiations. X's misrepresentation caused Y to agree to pay R220 000 for the car, instead of the R180 000 she would have offered to pay. The car is, in fact, worth only R150 000. The car would have been worth R250 000 if the misrepresentation was true. What amount will Y be able to claim from X based on fraudulent misrepresentation?

1 R0.

2 R30 000.

3 R40 000.

4 R70 000.

5 R100 000. (1)

Answer
3.

Discussion

The amount of damages which Y can claim for fraudulent misrepresentation depends on whether we are dealing with a case of *dolus incidens* or *dolus dans*. This question relates to *dolus incidens*, as Y would have concluded the contract anyway, despite the fraud, albeit for a lesser amount. With *dolus incidens*, Y can claim the difference between what she actually paid (R220 000) and the price she would have paid (R180 000), but for the fraudulent misrepresentation (Hutchison and Pretorius *Contract* 127-128).

The calculation is: R220 000 – R180 000 = R40 000. Therefore option 3 is correct.

Question 7

Assume the same facts as in question (6). What amount will Y be able to claim from X based on innocent misrepresentation (**NOT** a *dictum et promissum*)?

1 R0.

2 R30 000.

3 R40 000.

4 R70 000.

5 R100 000. (1)

Answer
1.

Discussion

There is no decision on the question whether damages can be claimed for innocent misrepresentation, only *dicta* (Hutchison and Pretorius *Contract* 131) for and against such a claim. Therefore option 1 is correct.

Question 8

Consider the same set of facts as in question (6). What amount will Y be able to claim from X based on X's *dictum et promissum*?

1 R0.

2 R30 000.

3 R40 000.

4 R70 000.

5 R100 000. (1)

Answer
4.

Discussion

The plaintiff can claim damages under the *actio quanti minoris* for the difference between the price paid and the actual value of the merx (Hutchison and Pretorius *Contract* 133). The calculation is: R220 000 - R150 000 = R70 000. Therefore option 4 is correct.

Question 9

Assume the same facts as in question (6). X guarantees the year model of the car. Y validly cancels the contract. The price is returned to Y and the car to X. What amount will Y be able to claim from X based on X's breach of the guarantee?

1 R0.

2 R30 000.

3 R40 000.

4 R70 000.

5 R100 000. (1)

Answer
2.

Discussion

This question deals with a claim for contractual damages based on the breach of the guarantee. A guarantee is a term of the contract and a breach thereof gives rise to the usual contractual remedies which includes a claim for damages. Here damages are measured according to the aggrieved party's positive interest. This means that the aggrieved party (Y) can demand to be placed in the financial position she would have occupied if the statement had been true (Hutchison and Pretorius *Contract* 117-118). In this question, if the statement made about the year model was true, the car would have been worth R250 000. However, presently Y is left with the price (R220 000) which X paid back to Y. Y's damage amounts to the difference between these two amounts: R250 000 – R220 000 = R30 000. It follows that option 2 is correct.

Question 10

X, an organiser of art exhibitions, contracted with Y for an exhibition to be held on 24 to 27 July. These dates were the only dates mentioned during the negotiations. After having been pressurized by X, Y hurriedly signed the standard form contract without reading it. The contract contained a clause permitting X to change the dates of the exhibition unilaterally. Thereafter X changed the dates. X had no reason to believe that Y would have signed the contract if he had known of the term. Which statement is **CORRECT**?

1 Y's mistake with regard to the presence of a clause in the standard form contract allowing X to unilaterally change the dates of the exhibition is a mistake in motive.

2 Y's mistake with regard to with regard to the presence of a clause in the standard form contract allowing X to unilaterally change the dates of the exhibition is an *error in substantia.*

3 Y can use the *iustus error* approach to prove that that a contract with X exists without the clause allowing X to unilaterally change the dates of the exhibition.

4 Y's mistake with regard to the presence of a clause in the standard form contract allowing X to unilaterally change the dates of the exhibition is unreasonable.

5 X's reliance that Y wanted to be bound by the standard form contract was unreasonable. (1)

Answer
5.

Discussion

Y's error with regard to the presence of a term in the contract allowing X to unilaterally change the dates of the exhibition is a mistake as to the legal consequences (obligations) the parties wished to create (Hutchison and Pretorius *Contract* 86).

Option 1 is incorrect. An error in motive relates to a party's reasons for entering into a contract (Hutchison and Pretorius *Contract* 87 90). Since the term in the contract allowing X to unilaterally change the dates was not the reason for Y to conclude the contract, the mistake relating to this term could not be an error in motive.

Option 2 is incorrect. An *error in substantia* is a mistake relating to the attributes or characteristics of the object of performance (Hutchison and Pretorius *Contract* 88 90). The mistake in this question relates to the term allowing for unilateral changes in the dates agreed upon, and therefore does not relate to a characteristic of any subject matter.

Option 3 is incorrect. The *iustus error* approach can only be used to prove that the contract between X and Y is void and not that a contract exists between X and Y without the clause allowing a unilateral change of the date (Hutchison and Pretorius *Contract* 99-100). The doctrine of quasi mutual assent has to be applied to prove such a contract (Hutchison and Pretorius *Contract* 95-97).

Option 4 is incorrect. This option relates to the application of the reasonableness requirement of the *iustus error* approach. Y's mistake relating to the relevant term in the contract is reasonable. A mistake will generally be reasonable (Hutchison and Pretorius *Contract* 100-103) in three instances of which only one is relevant, to this question. The relevant one is where the mistake was induced or caused by the failure of the contract enforcer to remove an incorrect impression (*ommissio*). Here it will only be wrongful if the contract enforcer breached a legal duty to speak in the circumstances. Such a duty will usually exist (Hutchison and Pretorius *Contract* 101-102) where the contract assertor knows or ought to know as a reasonable person that the other party is mistaken, or where the contract assertor, before the conclusion of the contract, created an impression which is in direct conflict with the agreement he or she seeks to enforce. Under these circumstances, the contract assertor must draw the contract denier's attention to this discrepancy. (Hutchison and Pretorius *Contract* 101-102). In this question, the only dates

mentioned during negotiations (for the exhibition) were 24-27 July. Since X had no reason to believe that Y would have signed the contract had Y known of the term allowing X to change the dates of the exhibition unilaterally, he (X) had a legal duty to point out this clause to Y. X's failure to do so, renders Y's mistake reasonable.

Option 5 is correct. This option deals involves to the application of the doctrine of quasi mutual assent (Hutchison and Pretorius *Contract* 95-97 103-105). By signing the contract, Y, a party to the contract, misrepresented her intention to be bound by the clause allowing X to unilaterally change the dates. X knew that the only dates mentioned during the negotiations were 24 to 27 July, that Y hastily signed the contract and that the contract had a clause allowing X to unilaterally change the dates. Although it could be argued that X was not actually misled by Y's misrepresentation, it is clear that a reasonable person would not have been misled. Indeed, X had no reason to believe that Y would have signed the contract had Y known of the term allowing X to change the dates of the exhibition unilaterally. In fact X had a legal duty to point out the presence of this clause in the agreement to Y. Therefore X's reliance that Y wanted to be bound by the standard form contract, was unreasonable.

2014

Semester 1

1.1 Assignment 01

Question

X, an organiser of art exhibitions, contracted with Y for an exhibition to be held on 24 to 27 July. These dates were the only dates mentioned during the negotiations. After having been pressurized by X, Y hurriedly signed the standard form contract without reading it. The contract contained a clause permitting X to change the dates of the exhibition unilaterally. Thereafter X changed the dates. X had no reason to believe that Y would have signed the contract if he had known of the term. Y averred that the contract was void. Will Y succeed in his attempt to have the contract set aside? Substantiate your answer and refer to relevant case law. Apply the **indirect reliance approach** of the courts in answering this question. Do not apply the **Consumer Protection Act** to this question. (10)

Answer

Identifying the problem

The facts seemingly indicate that X and Y have not reached consensus based on the will theory. If so, it is necessary to determine if Y may be held bound to a contract with X, based on the reliance theory, or whether Y will escape liability. Only the indirect approach to the reliance theory will be considered.

Discussing the relevant law applicable to the problem, referring to the relevant case law, *AND* applying the law to the facts of the problem

The indirect approach is the *iustus error*-approach. A party who acted under a mistake and wishes to escape liability (Y in our case) must prove that his / her mistake is material and reasonable.

At the outset it must be determined whether agreement (*consensus ad idem*) as a contractual basis exists between the parties, as required in terms of the will theory. Consensus has three elements (Hutchison and Pretorius (eds) *The law of Contract in South Africa* Oxford University Press Southern Africa 2012 14 85): the parties must seriously intend to contract, be of one mind as to the material aspects of the proposed agreement (the terms and the identity of the parties to it), and be conscious of the fact that their minds have met.

In the present case the parties were not in agreement as to the consequences they wished to create: Y thought that the dates for the art exhibition (X's performance) was fixed, while X knew that the contract allowed X to unilaterally change the dates. This is a mistake as to the obligations the parties wished to create which excludes *consensus* between the parties (Hutchison and Pretorius *Contract* 86). No contract can arise on the basis of the will theory. This type of mistake can be illustrated with a number of cases.

In *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 (4) SA 164 (D) the mistake related to performance and was thus material. The plaintiff believed that he was purchasing the erf shown to him by the seller's agent, while the written contract that he signed indicated the correct erf which was a completely different property. His mistake related to performance and was material. See also in *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 889 (A), the appellant signed an agreement containing a term excluding the respondent from liability for misrepresentation. Finally see *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (2) SA 234 (A) where the appellant erred with regard the period of the lease which was an aspect of the performance.

However, the matter does not end here, because Y still has to prove that his mistake is reasonable. A mistake will generally be reasonable (Hutchison and Pretorius *Contract* 100-103) in three instances of which only one is relevant, to this question.

Where the mistake was induced or caused by the failure of the contract enforcer to remove an incorrect impression (*ommissio*). The mistake will only be wrongful if the contract enforcer breached a legal duty to speak in the circumstances. Such a duty will usually exist (Hutchison and Pretorius *Contract* 101-102) where the contract assertor knows or ought to know as a reasonable person that the other party is mistaken, or where the contract assertor, before the conclusion of the contract, created an impression which is in direct conflict with the agreement he or she seeks to enforce. Under these circumstances, the contract assertor must draw the contract denier’s attention to this discrepancy. (See the *Du Toit* case; Hutchison and Pretorius *Contract* 101-102).

In this question, the only dates mentioned during negotiations (for the exhibition) were 24-27 July. Since X had no reason to believe that Y would have signed the contract had Y known of the term allowing X to change the dates of the exhibition unilaterally, he (X) had a legal duty to point out this clause to Y. X’s failure to do so, renders Y’s material mistake reasonable.

The giving of appropriate advice

Y is not bound by the agreement with X because of the lack of actual and apparent consensus.

Total: [10]

1.2 Assignment 02

Question 1

Which of the following is **NOT** a requirement for a valid contract?

1 Consensus

2 Formalities

3 Possibility

4 Reciprocity

5 Certainty (1)

Answer

4.

Discussion

See Hutchison and Pretorius (eds) *The law of Contract in South Africa* Oxford University Press Southern Africa 2012 6.

Question 2

Which statement is **INCORRECT**?

1 A contract is a unilateral or even bilateral juristic act.

2 A contract entails promises or undertakings on one or both sides.

3 An undertaking in a contract that a certain state of affairs exists, or has existed, is known as a warranty.

4 The conclusion of a contract can be multilateral.

5 Freedom of contract means that the parties can agree to anything that is possible and lawful. (1)

Answer

1.

Discussion

A contract is never a unilateral juristic act. See Hutchison and Pretorius *Contract* 6.

Question 3

Which statement is **INCORRECT**?

1 An obligation is a legal bond between a debtor and a creditor.

2 With a contract of sale, the seller is the debtor in respect of the duty to deliver the thing sold, and the seller is the creditor in respect to the obligation relating to the duty to pay the price.

3 An obligation comprises a right and a corresponding duty: the right of the creditor to demand a performance by the debtor, and the duty of the debtor to make that performance.

4 A natural obligation is unenforceable in a court of law.

5 The right created by an obligation is a real right. (1)

Answer

5.

Discussion

The right created by an obligation is always a personal and never a real right. See Hutchison and Pretorius *Contract* 8.

Question 4

Which statement is **INCORRECT**?

1 A delict is wrongful and blameworthy conduct that causes harm to a person, and which obliges the wrongdoer to compensate the injured party.

2 Concurrent liability exists where the same conduct might constitute both a delict and a breach of contract, as when a surgeon who has contracted to perform an operation negligently leaves a cotton swab inside the patient's body.

3 The essential difference between contractual and delictual obligations is that the latter are, as a general rule, voluntarily assumed by the parties themselves, whereas the former are imposed by law, irrespective of the will of the parties.

4 The courts have shown great reluctance to permit claims in delict for economic losses caused by a breach of contract.

5 Unjustified enrichment occurs when there is a shift of wealth from one person's estate to another's without a good legal ground or cause for this shift. (1)

Answer

3.

Discussion

Contractual obligations are, as a general rule, voluntarily assumed by the parties themselves, whereas delictual obligations are imposed by law, irrespective of the will of the parties. See Hutchison and Pretorius *Contract* 8.

Question 5

Which statement relating to the Bill of Rights in the Constitution of the Republic of South Africa,

1996, is **CORRECT**?

1 Vertical application relates to relationships between private persons, as in most contractual situations.

2 Horizontal application relates to relationships between the state and the individual.

3 In *Barkhuizen v Napier* 2007 (5) SA 323 (CC), the majority in the Constitutional Court ruled that a contractual term can be tested directly against a provision in the Bill of Rights.

4 In *Barkhuizen v Napier* 2007 (5) SA 323 (CC), the minority in the Constitutional Court preferred an indirect application of the Constitution to the contractual dispute before them.

5 In *Barkhuizen v Napier* 2007 (5) SA 323 (CC), Ngcobo J reasoned that the proper approach to constitutional challenges to contractual terms, is to determine whether the term challenged is contrary to public policy; and what constitutes public policy must be discerned with reference to the fundamental values embodied in the Constitution. (1)

Answer

5.

Discussion

Option 1 and 2 are incorrect, because the relationship between the state and the individual is vertical, whereas the relationship between private persons is horizontal. Option 3 and 4 are also incorrect. In *Barkhuizen v Napier* 2007 (5) SA 323 (CC) the majority in the Constitutional Court preferred an indirect application of the Constitution to the contractual dispute before them, but the minority ruled that a contractual term can be tested directly against a provision in the Bill of Rights. Option 5 is correct. See Hutchison and Pretorius *Contract* 35 37.

Question 6

Cedric has joined a religious sect. Recently this sect took advantage of Cedric's good nature and convinced him to donate his motor vehicle to the sect, which Cedric did. Cedric approaches you for legal advice, explaining that he wants his motor vehicle returned to him. The issue emanating from these facts relates to

1 duress.

2 undue influence.

3 commercial bribery.

4 puffs.

5 *dicta et promissa*. (1)

Answer

2.

Discussion

You have to look what the requirements of each option are to answer this question. There was

no actual violence or reasonable fear present and hence duress was not present (Hutchison and Pretorius *Contract* 137). It cannot be commercial bribery because there was no reward paid or promised (Hutchison and Pretorius *Contract* 143). It also cannot be puffing as there was no general praise or commendation (Hutchison and Pretorius *Contract* 119), nor a *dictum et promissum* as there was no material statement bearing on the quality of the thing sold (Hutchison and Pretorius *Contract* 119). The three requirements of undue influence are present: the sect obtained influence over Cedric and used this in an unscrupulous manner to persuade him to donate his car to the sect to his detriment. This they seem to have accomplished by weakening his power of resistance and rendering his will compliant (Hutchison and Pretorius *Contract* 141-142).

Question 7

Assume the same facts as in question (6). A court presiding over this case is likely to find that the religious sect

1 threatened Cedric and more particularly his property.

2 instilled reasonable fear in Cedric.

3 coerced Cedric to donate his motor vehicle to the sect.

4 obtained an influence over Cedric, and that this influence weakened his powers of resistance and rendered his will compliant.

5 conducted itself in such a distasteful manner that it amounts to supervening impossibility of performance. (1)

Answer

4.

Discussion

This question also relates to the requirements of some of the options in the previous question. Option 4 is the only one that relates to undue influence (Hutchison and Pretorius *Contract* 141-142).

Question 8

Which of the following is **NOT** an element for commercial bribery?

1 A reward.

2 The one party is the briber.

3 The principal is able to exert influence over a third party.

4 The agent may be an agent in the true sense or merely a go-between or facilitator.

5 A direct or indirect benefit is sought for the briber. (1)

Answer

3.

Discussion

See Hutchison and Pretorius *Law of Contract* 143.

Question 9

If commercial bribery exists, the agreement between the briber and the agent is

1 voidable.

2 void.

3 void and voidable.

4 neither void nor voidable.

5 for the benefit of a third party. (1)

Answer

2.

Discussion

See Hutchison and Pretorius *Contract* 56-61.

Question 10

If commercial bribery exists, the agreement between the briber and the principal is

1 voidable.

2 void.

3 void and voidable.

4 neither void nor voidable.
5 for the benefit of a third party.

Answer

1.

Discussion

See the Study Guide 63.

2014
Semester 2

1.1 Assignment 01

Question

X, an organiser of art exhibitions, contracted with Y for an exhibition to be held on 24 to 27 July. These dates were the only dates mentioned during the negotiations. After having been pressurized by X, Y hurriedly signed the standard form contract without reading it. The contract contained a clause permitting X to change the dates of the exhibition unilaterally. Thereafter X changed the dates. X had no reason to believe that Y would have signed the contract if he had known of the term. Y averred that the contract was void. Will Y succeed in his attempt to have the contract set aside? Substantiate your answer and refer to relevant case law. Apply the **direct reliance approach** of the courts in answering this question. Do not apply the **Consumer Protection Act** to this question. (10)

Answer

Identifying the problem

The facts seemingly indicate that X and Y have not reached consensus based on the will theory. If so, it is necessary to determine if Y may be held bound to a contract with X, based on the reliance theory, or whether Y will escape liability. Only the direct approach to the reliance theory will be considered.

Discussing the relevant law applicable to the problem, referring to the relevant case law, *AND* applying the law to the facts of the problem

The direct reliance approach can only be applied after it has been determined that Y acted under a material mistake. It must thus be determined whether agreement (*consensus ad idem*) as a contractual basis exists between the parties, as required in terms of the will theory.

The first step is to determine whether agreement (*consensus ad idem*) as a contractual basis exists between the parties, as required in terms of the will theory. Consensus has three elements (Hutchison and Pretorius (eds) *The law of Contract in South Africa* Oxford University Press Southern Africa 2012 14 85): the parties must seriously intend to contract, be of one mind as to the material aspects of the proposed agreement (the terms and the identity of the parties to it), and be conscious of the fact that their minds have met.

In the present case the parties were not in agreement as to the consequences they wished to create: Y thought that the dates for the art exhibition (X's performance) was fixed, while X knew that the contract allowed X to unilaterally change the dates. This is a mistake as to the obligations the parties wished to create which excludes *consensus* between the parties (Hutchison and Pretorius *Contract* 86). No contract can arise on the basis of the will theory. This type of mistake can be illustrated with a number of cases.

In *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 (4) SA 164 (D) the plaintiff believed that he was purchasing the erf shown to him by the seller's agent, while the written contract that he signed indicated a completely different property. His mistake related to performance and was material. See also *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 889 (A). The appellant signed an agreement containing a term excluding the respondent from liability for misrepresentation. Finally see *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (2) SA 234 (A) where the appellant erred with regard the period of the lease which was an aspect of the performance.

The direct reliance approach can now be applied to the facts of the problem (Hutchison and Pretorius *Contract* 18-19 95-97 103-105). The court stated the test in *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (2) SA 234 (A) 239-240 as follows:

> In my view, therefore, the decisive question in a case like the present is this: did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention? … To answer this question, a three-fold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party's intention; secondly, who made that representation; and thirdly, was the other party misled thereby? … The last question postulates two possibilities: Was he actually misled and would a reasonable man have been misled?

A discussion of *Ridon v Van der Spuy and Partners (Wes-Kaap) Inc* 2002 (2) SA 121 (K) and *Steyn v LSA Motors Ltd* 1994 (1) SA 49 (A) will also be appropriate.

By signing the contract, Y, a party to the contract, misrepresented his intention to be bound by the clause allowing X to unilaterally change the dates. X knew that the only dates mentioned during the negotiations were 24 to 27 July, that Y hastily signed the contract and that the contract had a clause allowing X to unilaterally change the dates. Although it could be argued that X was not actually misled by Y's misrepresentation, it is clear that a reasonable person would not have been misled in any case. Indeed, X had no reason to believe that Y would have signed the contract had Y known of the term allowing X to change the dates of the exhibition unilaterally. In fact X had a legal duty to point out the presence of this clause in the agreement to Y. There was either no actual or at least reasonable reliance on the part of X.

The giving of appropriate advice

Y is not bound by the agreement with X because of the lack of actual and apparent consensus.

Total: [10]

1.2 Assignment 02

Question 1

Which statement is **INCORRECT**?

1 Obligatory agreements create one or more obligations.

2 Absolving agreements discharge or extinguish obligations.

3 Real agreements transfer rights.

4 Transfer agreements transfer rights.

5 All binding agreements are contracts. (1)

Answer

5**.**

Discussion

There are many other binding agreements besides contracts. See Hutchison and Pretorius (eds) *The law of Contract in South Africa* Oxford University Press Southern Africa 2012 4-5.

Question 2

Which term / phrase is **NOT** linked to the characteristic features of a contract?

1 Juristic act.

2 Bilateral in nature.

3 Unilateral promise.

4 Multilateral in nature.

5 Promises or undertakings. (1)

Answer

3.

Discussion

A contract is never a unilateral promise. See Hutchison and Pretorius *Contract* 6-7.

Question 3

What theory regards the inner wills of the parties as irrelevant on the basis that what the parties say and do are important and not what the parties think?

1 The declaration theory.

2 The will theory.

3 The reliance theory.

4 The reception theory.

5 The expedition theory. (1)

Answer

1.

Discussion

See Hutchison and Pretorius *Contract* 15-16.

Question 4

The majority in *Barkhuizen v Napier* 2007 (5) SA 323 (CC) held that

1 *pacta sunt servanda* is not a profoundly moral principle on which the coherence of any society relies.

2 the validity of a contractual term can be directly tested against a provision of the Bill of Rights in the Constitution.

3 unfair or unreasonable contractual provisions would always be enforced.

4 self-autonomy or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity.

5 public policy is not informed by the concept of *ubuntu*. (1)

Answer

4.

Discussion

See Hutchison and Pretorius *Contract* 26, 30-31, 178-179.

Question 5

S and V were staying in the same hotel in Cape Town, when V made a verbal offer to S. S returned to Johannesburg where she resided to consider the offer. Three days before the final day for acceptance, she tried to contact V telephonically to inform him of her acceptance, but he was unavailable. She immediately wrote a letter of acceptance which she posted the same day, but it reached V only after the deadline for acceptance had passed. Which theory is applicable to determine if a valid contract was concluded?

1 The information theory.

2 The expedition theory.

3 The reception theory.

4 The reliance theory.

5 The declaration theory. (1)

Answer

1.

Discussion

The information theory is the general rule, unless the offeror expressly or impliedly waives it. The latter is for example the case where the offer has been made by post. In this problem the offer has not been made by post and the general rule therefore applies. See Hutchison and Pretorius *Contract* 56-59.

Question 6

X sends an offer by email to Z on 1 February, and informs Z that the offer will lapse on 10 February. Z sends an email to X on 8 February, in which she accepts the offer. Z's email reaches X's email address on 9 February. X only reads Z's email on 11 February. Which is the **CORRECT** statement?

1 Depending on the facts, either the expedition theory or the reception theory may be used to determine if a valid contract was concluded.

2 A valid contract was concluded between X and Z, because the expedition theory applies.

3 A valid contract was concluded between X and Z, because the declaration theory applies.

4 A valid contract was concluded between X and Z, because the information theory applies.

5 A valid contract was concluded between X and Z, because a type of reception theory applies. (1)

Answer

5.

Discussion

The Electronic Communications and Transactions Act 25 of 2002 is applicable to contracts entered into by means of email. The reception theory thus applies. (Hutchison and Pretorius *Contract* 59).

Question 7

A contractual term in a contract which is regulated by the Consumer Protection Act 68 of 2008 and which is to the effect that the consumer acknowledges that no misrepresentation has been made to him / her,

1 is effective only if the supplier has made the customer aware that such a provision exists in the contract.

2 is effective only in the absence of fraud.

3 is prohibited.

4 could be effective or prohibited which outcome shall be decided by the discretion of the presiding judicial officer.

5 is effective only if the customer acknowledged his / her awareness of such a term by signing or initialling next to the term. (1)

Answer

3.

Discussion

See Hutchison and Pretorius *Contract* 33-34.

Question 8

Which statement about the Consumer Protection Act 68 of 2008 is **INCORRECT**?

1 The Act has a number of provisions that overlap considerably with the common law relating to improperly obtained consensus.

2 The Act prohibits various forms of unconscionable conduct on the part of suppliers or their agents.

3 The Act prohibits non-disclosure of material facts to consumers.

4 It is not unconscionable for a supplier knowingly to take advantage of the fact that a consumer was substantially unable to protect his or her own interests due to ignorance.

5 Suppliers suspected of engaging in prohibited conduct will be issued with compliance notices by a regulatory body formed in terms of the Act. (1)

Answer

4.

Discussion

See Hutchison and Pretorius *Contract* 32-35.

Question 9

X is on her way from work and sees a white bull terrier bitch hiding in a doorway. Being an animal lover, she takes the dog home with her. At home she notices a tag on the dog's collar with the owners contact details. She contacts the owner, Y, and Y and his dog are subsequently re-united. The following day X sees the following advertisement in the newspaper:

> Lost in Johannesburg City Centre on 27 May. Pedigree white bull terrier bitch with black patch over left eye. Answers to the name of Beauty. Reward of R1 000 for information leading to safe return. Tel 011 555 5555.

She claims the R1 000 reward from Y who refuses to pay X any amount. Which statement is **INCORRECT**?

1 The offer was clear and certain.

2 X has suffered financial or patrimonial loss.

3 An agreement was not concluded based on the reception theory.

4 The acceptance was a conscious response to the offer.

5 No agreement was concluded even though there was no revocation of the offer when the acceptance was made. (1)

Answer

4.

Discussion

The statement in option 1 is correct, because the offer of reward was clear and certain (Hutchison and Pretorius *Contract* 48). The statement in option 2 is also correct because X did suffer patrimonial loss although X will only be able to claim this loss if a valid contract arose. The statement in option 3 is also correct: The offeror of the reward did not expressly or tacitly make the reception theory applicable to the acceptance of the offer of reward (Hutchison and Pretorius *Contract* 56-60). In this problem X's response to the offer was not conscious and thus no contract came into being (Hutchison and Pretorius *Contract* 56). The statement in option 4 is thus incorrect and the statement in option 5 correct.

Question 10

X has been leasing a commercial property from Z for the past three years. The lease will come to an end on 31 May. On 5 March, X phones Z and offers to renew the lease for a further three years, which offer Z accepts. During this phone call, the material terms of the renewal agreement are agreed upon and X and Z further agree that the said material terms must be reduced to writing and signed by both parties. Subsequently on 5 April, X is shocked to receive a letter from Z, advising X that there will be no renewal of the lease and that X should vacate the

leased property on 31 May. X and Z never reduced their oral agreement to writing. Which is the most contentious issue that arises from this set of facts?

1 Whether a formality has been stipulated by X and Z.

2 Whether a formality has been prescribed by law.

3 Whether the *Shifren* principle applies to this dispute.

4 Whether the contractual principles relating to restraint of trade applies to this dispute, based on the judgment in *Goldblatt v Freemantle* 1920 AD 123.

5 Whether the principles relating to the *exceptio doli generalis* applies to this dispute. (1)

Answer

1.

Discussion

We are dealing with a formality stipulated by the parties because X and Z agreed that their agreement must be reduced to writing and signed. See Hutchison and Pretorius *Contract* 16-166.

2013
Semester 1

This tutorial letter contains the memoranda of the answers to the assignments.

1.1 Assignment 01

Question

Albert takes his motor vehicle to Dodgy Motors for a service. On his arrival, he is asked to sign a "job card" by the owner. Albert enquires why he is required to sign the "job card" and the owner explains to him that by signing he is authorising them to conduct the service on his car which will cost R1 000. He signs the "job card" without reading it. The "job card" contains a contractual clause authorising Dodgy Motors to do any repairs on the motor vehicle which they deem necessary without asking the client's authorisation and requiring the client to pay for such repairs. While servicing the car, the service manager finds faults on the car (unrelated to the service) and he proceeds to do these additional repairs for a further R2 000. Albert refuses to pay for the service and the additional repairs and argues that he did not read the "job card" and did not know of the existence of all the terms of the contract. Advise Dodgy Motors on whether Albert is liable to pay Dodgy Motors R1 000 for the service of Albert's car. Apply the **direct reliance approach** of the courts in answering this question. Do not apply the **Consumer Protection Act** to this question.

(10)

Answer

Identifying the problem

The essence of this problem is the question whether Albert and the owner of Dodgy Motors have reached actual consensus or ostensible consensus. Albert will not be contractually bound to pay for the R1 000 service if this requirement for a valid contract is absent.

Discussing the relevant law applicable to the problem, referring to the relevant case law, *AND* applying the law to the facts of the problem

At the outset it must be determined whether agreement (*consensus ad idem*) as a contractual basis exists between the parties, as required in terms of the will theory. Consensus has three elements (Hutchison and Pretorius (2ed) *The law of Contract in South Africa* Oxford University Press Southern Africa 2012 13-14 85-87): the parties must seriously intend to contract, be of one mind as to the material aspects of the proposed agreement (the terms and the identity of the parties to it), and be conscious of the fact that their minds have met. <u>There are two possible ways of addressing this issue. Both motivations will be credited equally.</u>

(a) In the present case the parties were in agreement as to the consequences they wished to create, relating to the service for R1 000: Albert clearly authorised Dodgy Motors to service his motor vehicle at a cost of R1 000, as it was expressly explained to Albert that by signing the "job card" he was authorising Dodgy Motors to service his motor vehicle, at a cost of R1 000. It follows that when Albert signed the job card, both parties clearly understood their obligations: Dodgy motors would service the motor vehicle, and in return Albert would pay Dodgy Motors

R1 000. This means that there was *consensus* between the parties, resulting in the existence of a valid contract based on the will theory. Consensus existed between the parties as there was a clear offer to service the motor vehicle for R1 000, which Albert accepted when he signed the "job card". Therefore Albert is liable to pay R1 000 for the service. Based on this conclusion it is not necessary to consider the direct reliance approach, however, because the question requires same, it will be considered below.

OR

(b) In the present case the parties were not in agreement as to the consequences they wished to create: Albert thought that he was authorising Dodgy Motors to only service his car, while the owner of Dodgy Motors knew that the contract also allowed Dodgy Motors to conduct repairs on the car for which they deem necessary and payable by Albert without any further authorisation from Albert. This is a mistake as to the obligations the parties wished to create and is a material mistake which excludes *consensus* between the parties. This means that no contract could arise on the basis of the will theory for both the service of the car and the additional repairs. This type of mistake can be illustrated with a number of cases.

In *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) the appellant signed a hotel register without reading it. The hotel register contained a term excluding the respondent from liability for certain acts. The appellant was unaware of this term and his mistake related to a term which he believed would not be in the contract and as such was material because it related to an aspect of performance.

In *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 (4) SA 164 (D) the mistake related to performance and was thus material. The plaintiff believed that he was purchasing the erf shown to him by the seller's agent, while the written contract that he signed indicated the correct erf which was a completely different property. His mistake related to performance and was material. See also in *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 889 (A), the appellant signed an agreement containing a term excluding the respondent from liability for misrepresentation. Finally see *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (2) SA 234 (A) where the appellant erred with regard to the period of the lease which was an aspect of the performance and thus material.

Whether the motivation under papragraph (a) or (b) above was used, it is still necessary to consider if contractual liability exists based on the **direct** reliance approach (as per the instruction in the question), relating to the service for R1 000.

Direct Approach

With reference to the direct approach, contractual liability is based on the reasonable reliance that *consensus* has been reached which the one contractant (contract denier) creates in the mind of the other contractant (contract enforcer).

According to the *Sonap* case the direct reliance approach entails a threefold enquiry:

* Was there a misrepresentation regarding one party's intention? Because Albert is now disputing liability to pay Dodgy Motors R1 000, it appears that by signing the contract Albert made a misrepresentation that he would be bound to pay Dodgy Motors once the service to his car is completed.
* Who made the misrepresentation? In the problem it was made by a party to the contract, Albert.

* Was the other party actually misled by the misrepresentation and, if so, would a reasonable man also have been misled? Dodgy Motors was misled and a reasonable man would also have been misled to think that by signing the card, Albert was authorising the service to be done. This is the case as Albert was told that by signing the "job card", he is authorising Dodgy Motors to conduct the service on his car, at a cost of R1 000.

In our problem Albert did create a reasonable reliance that he wished to be bound contractually for the sum of R1 000. In any event, if Albert was not contractually bound, he may nevertheless be liable to pay this amount to Dodgy Motors, based on an unjustified enrichment claim.

Additional marks are also awarded where it is motivated that that Albert is not contractually liable to pay R2 000 for the additional repairs because he could not have expected the relevant term to be in the contract (based on the correct application of the above three fold enquiry set out in the *Sonap* case). However, this does not exclude the possibility that Albert may be liable for unjustifiable enrichment for R2 000, for the additional repairs.

The giving of appropriate advice

Albert is bound by an agreement to pay Dodgy Motors R1 000 for the service conducted on his motor vehicle. This is based on actual and/or apparent consensus.

Total: [10]

1.2 Assignment 02

Question 1

A selects and pays for several items in a supermarket, and leaves. What type of agreement has been concluded?

1 An agreement creating obligations.
2 An agreement extinguishing a debt.
3 A real agreement.
4 All of the above.
5 None of the above. (1)

Answer

4.

Discussion

See Hutchison and Pretorius (2ed) *The law of Contract in South Africa* Oxford University Press Southern Africa 2012 4-5.

Question 2

The notion that contracts are based on consensus, has given rise to which theory?

1 The declaration theory.
2 The will theory.
3 The reliance theory.
4 The reception theory.
5 The expedition theory. (1)

Answer

2.

Discussion

See Hutchison and Pretorius *Contract* 15.

Question 3

X sells his shop (a business) in a shopping mall to Y. During the negotiations X informs Y of the overhead costs of running the shop but fails to mention that the rental for the shop space is soon to escalate dramatically. In fact the rent will be so high that the shop will scarcely be able to turn a profit. What cause of action will Y be able to rely on in the circumstances?

1 *Dictum et promissum*.
2 Innocent misrepresentation.
3 Culpable misrepresentation.
4 Material mistake.
5 Non-material mistake. (1)

Answer

3.

Discussion

The failure by X to disclose that the rental for the shop space is soon to escalate dramatically can amount to a culpable misrepresentation, and therefore serves as an appropriate cause of action to rely on. An omission cannot amount to an innocent misrepresentation or a *dictum et promissum*. Y's mistake is only a mistake with regard to a characteristic of the business which is not a material mistake. In the circumstances, a non-material mistake does not provide for an appropriate remedy to Y, therefore it is not a suitable cause of action to rely on. See Hutchison and Pretorius *Contract* 83-90 116-136.

Question 4

Assume the same facts as in question (3). If Y would not have bought the shop had she (Y) known of the rent escalation, according to what measure would Y's damages be calculated in the circumstances?

1 The *actio quanti minoris*.
2 The *actio redhibitoria*.
3 Positive interest.
4 *Dolus incidens*.
5 *Dolus dans*. (1)

Answer

5.

Discussion

Y's damages will be calculated based on *dolus dans*. In this regard, damages is calculated on the basis that Y would not have bought the shop had she (Y) known of the rent escalation. If successful, Y would be placed in the financial position that she would have occupied had she not contracted, which quantifies as negative interest. Positive interest, which seeks to place the aggrieved party in the position she would have occupied if the other party had not breached the contract, is not applicable to this question which deals with a claim for culpable misrepresentation, and not breach of contract. The *actio quanti minoris* relates to a claim for a reduction of the price, which infers that Y would have bought the shop, and is therefore not applicable to this question as the facts state that Y would not have bought the shop. The measure of damages calculated for *dolus incidens* is if Y would have nevertheless bought the shop under different terms (despite the misrepresentation), which is not the case based on the facts. The *actio redhibitoria* is a remedy that relates to cancellation of the contract, and does not relate to the remedy of damages. Therefore the *actio redhibitoria* is not applicable to this question. See Hutchison and Pretorius *Contract* 117-118 122-136.

Question 5

Assume the same facts as in question (4). If Y wanted to cancel the contract what would she usually have to do?

1 Tender restitution.
2 Invoke the res vendita.
3 Pay damages to X.
4 Use the actio redhibitoria.
5 None of the above. (1)

Answer

1.

Discussion

See Hutchison and Pretorius *Contract* 114.

Question 6

Mark is engaged to Jane. Mark has a very strong personality and eventually persuades Jane to sell and transfer her house that is worth R900 000 to him at a purchase price of a mere R20 000. After registration of the property in Mark's name he breaks off the engagement. Which of the following requirement(s) is / are relevant for Jane to prove, in her pursuit to have the transfer of the house into Mark's name set aside?

(a) Mark exercised an influence over her.
(b) Mark exercised this influence over her, in an unscrupulous manner in order to induce her to consent to a transaction which is to her detriment and which she, with normal free will, would not have concluded.
(c) Mark gained this influence by standing in a position of trust in relation to her.
(d) This influence exercised by Mark over her, amounted to intimidation which was not imposed in good faith.

1 (a) and (d).
2 (a) and (b).
3 (a), (b) and (c).
4 (a), (b) and (d).
5 (a), (b), (c) and (d). (1)

Answer

2.

Discussion

It seems as though Jane was unduly influenced by Mark. To get the agreement which resulted in the transfer set aside, Jane will have to prove all the requirements for undue influence. From the question, the only two requirements applicable are (a) and (b). The other requirement which is not mentioned above, is that Jane would have to prove that this influence (which Mark exercised over her), weakened her powers of resistance and rendered her will compliant. Whilst option (c) is not a requirement, proof of such a relationship between the parties is a relevant factor that may assist in proving the requirements for undue influence. Option (d) is not a requirement for undue influence, as it relates to duress. Hutchison and Pretorius *Contract* 141-143.

Question 7

X promises to give Y R10 000 if Y successfully climbs Everest within two weeks. This is an obligation subject to a:

1 suspensive time clause
2 resolutive time clause
3 suspensive condition
4 resolutive condition
5 modus. (1)

Answer

3.

Discussion

The obligation is subject to a suspensive condition, as the obligation to pay R10 000 is suspended and only becomes enforceable if Y climbs Everest in two weeks (which is the uncertain future event which may or may not occur). A resolutive condition is a condition on the fulfilment of which the contract (or obligation) ceases to exist, which is not applicable to this question which makes the R10 000 payable if the condition is fulfilled. A time clause is a contractual term that makes the existence of an obligation dependent on an event or time that is certain to arise in the future. Since this question relates to an uncertain future event, and not a certain future event, a time clause is not applicable to this question. A modus is a term that imposes a duty on the recipient of the performance to do something in the future. This is not relevant to this question, as nothing is imposed on Y to do in the future, if he fulfils the condition and receives the R10 000. See Hutchison and Pretorius *Contract* 249-254.

Question 8

Y offers to sell his BMW motor car to Z on 1 July, for R50 000. One of the terms of Y's offer is that the offer lapses on 30 August. However, on 20 July Y notifies Z that the offer is cancelled. Z insists that the offer is valid until 30 August and on 25 July Z notifies Y that he (Z) accepts the offer. Which statement reflects the CORRECT legal position?

1 Y and Z concluded an option contract.
2 Y and Z did not conclude an option contract.
3 Y and Z did not conclude a pre-emption contract.
4 Y and Z concluded a pre-emption contract.
5 2 and 3. (1)

Answer

5.

Discussion

Contracting parties may enter into an agreement in terms of which the offeror undertakes not to revoke his or her offer. In such a case, it is said that one party grants the other an option (Study Guide 26-27). For this question, an option does not exist because there is no agreement in place which binds Y to keep his offer open until 30 August. Y has unilaterally imposed this upon himself in the offer, but it was certainly not an agreement by both parties to hold Y to his offer to keep it open until this date. This means that no option contract was concluded. A right of pre-emption also does not exist. A right of pre-emption occurs when a prospective seller undertakes as against a prospective purchaser to give the prospective purchaser preference if the prospective seller should decide to sell. The prospective purchaser thus acquires in terms of an agreement the right to be granted the first opportunity to buy the thing should the prospective seller decide to sell (Study Guide 31-32). Therefore no right of preference was created in an agreement in this question. In summary, no option or pre-emption contract exists between both parties.

Question 9

A right of pre-emption

1 is a right acquired by a contract.
2 is a right acquired by an offer.
3 is a right acquired in terms of an option.
4 is a preferential right entitling the grantee to compel the grantor to sell the thing in question at anytime.
5 encapsulates all of the above statements. (1)

Answer

1.

Discussion

A right of pre-emption occurs when a prospective seller undertakes as against a prospective purchaser to give the prospective purchaser preference if the prospective seller should decide to sell. The prospective purchaser thus acquires, in terms of an agreement (or contract), the right to be granted the first opportunity to buy the thing should the prospective seller decide to sell (Study Guide 31-33). Therefore a contract is required to create a right of pre-emption, and not just an offer. Note also that in terms of a right of pre-emption the grantor cannot be compelled to sell at anytime, it is only when the grantor decides to sell at his or her discretion, that the prospective purchaser has a right to have the first opportunity to buy the thing. A right of pre-emption is not acquired in terms of an option. These two types of rights differ by definition. See the discussion in question 8 regarding the definition of the latter.

Question 10

Y lets premises to X. The lease contains a clause prohibiting X from sub-letting the premises without the written consent of Y. A further clause of the lease requires that any variation of the terms of the lease (including this clause) has to be in writing and signed by both parties. Later Y and X agree orally that X can sub-let the premises. After X has sub-let the premises to a third party, Y changes his mind and informs X that both X and the sub-lessee (third party) should vacate the premises because X has breached the contract by subletting the premises. Which answer reflects the correct legal position?

1 X does not breach the contract, because the oral agreement constitutes a binding contract, based on the reliance theory.
2 X breaches the contract, because the oral agreement is not legally binding.
3 X does not breach the contract, because the oral agreement constitutes a binding tacit contract.
4 Y breaches the oral agreement and therefore X and the sub-lessee are entitled to remain on the premises.
5 X breaches the contract of lease and Y breaches the subsequent oral agreement. Therefore both parties are in equal guilt, entitling X as the possessor to remain on the premises. (1)

Answer

2.

Discussion

In this question, the facts indicate that the parties have stipulated a formality in their lease agreement. The formality in question is what is commonly referred to as a non-variation clause. This clause typically prohibits oral variation of the terms of a contract, unless it is reduced to writing and signed by both parties. In this context, an oral agreement by the parties to vary the terms of the contract is not legally binding, and can lead to one party breaching the contract, which is the case in this question. See discussion of non-variation clauses and *SA Sentrale Ko-operatiewe Graanmaatskappy Bpk v Shifren* 1964 (4) SA 760 (A) in Hutchison and Pretorius *Contract* 165-166.

Total: [10]

2012
Semester 1

1.1 Assignment 01

Question

X, an organiser of art exhibitions, contracted with Y for an exhibition to be held on 24 to 27 July. These dates were the only dates mentioned during the negotiations. After having been pressurized by X, Y hurriedly signed the standard form contract without reading it. The contract contained a clause permitting X to change the dates of the exhibition unilaterally. Thereafter X changed the dates. X had no reason to believe that Y would have signed the contract if he had known of the term. Y averred that the contract was void. Will Y succeed in his attempt to have the contract set aside? Substantiate your answer and refer to relevant case law. Apply the **indirect reliance approach** of the courts in answering this question. (10)

Answer

Identifying the problem

The facts seemingly indicate that X and Y have not reached consensus based on the will theory. If so, it is necessary to determine if Y may be held bound to a contract with X, based on the reliance theory, or whether Y will escape liability. Only the indirect approach to the reliance theory will be considered.

Discussing the relevant law applicable to the problem, referring to the relevant case law, *AND* applying the law to the facts of the problem

The indirect approach is the *iustus error*-approach. A party who acted under a mistake and wishes to escape liability (Y in our case) must prove that his / her mistake is material and reasonable.

At the outset it must be determined whether agreement (*consensus ad idem*) as a contractual basis exists between the parties, as required in terms of the will theory. Consensus has three elements (Hutchison and Pretorius (eds) *The law of Contract in South Africa* Oxford University Press Southern Africa 2009 14 85): the parties must seriously intend to contract, be of one mind as to the material aspects of the proposed agreement (the terms and the identity of the parties to it), and be conscious of the fact that their minds have met.

In the present case the parties were not in agreement as to the consequences they wished to create: Y thought that the dates for the art exhibition (X's performance) was fixed, while X knew that the contract allowed X to unilaterally change the dates. This is a mistake as to the obligations the parties wished to create which excludes *consensus* between the parties. No contract can arise on the basis of the will theory. This type of mistake can be illustrated with a number of cases.

In *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 (4) SA 164 (D) the mistake related to performance and was thus material. The plaintiff believed that he was purchasing the erf shown to him by the seller's agent, while the written contract that he signed indicated the correct erf which was a completely different property. His mistake related to performance and was material. See also in *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 889 (A), the appellant signed an agreement containing a term excluding the respondent from liability for misrepresentation. Finally see *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (2) SA 234 (A) where the appellant erred with regard the period of the lease which was an aspect of the performance.

However, the matter does not end here, because Y still has to prove that his mistake is reasonable. A mistake will generally be reasonable (Hutchison and Pretorius *Contract* 100-103) in three instances of which only one is relevant, to this question.

Where the mistake was induced or caused by the failure of the contract enforcer to remove an incorrect impression (*ommissio*). Here it will only be wrongful if the contract enforcer breached a legal duty to speak in the circumstances. Such a duty will usually exist (Hutchison and Pretorius *Contract* 101-102) where the contract assertor knows or ought to know as a reasonable person that the other party is mistaken, or where the contract assertor, before the conclusion of the contract, created an impression which is in direct conflict with the agreement he or she seeks to enforce. Under these circumstances, the contract assertor must draw the contract denier's attention to this discrepancy. (See the *Du Toit* case; Hutchison and Pretorius *Contract* 101-102).

In this question, the only dates mentioned during negotiations (for the exhibition) were 24-27 July. Since X had no reason to believe that Y would have signed the contract had Y known of the term allowing X to change the dates of the exhibition unilaterally, he (X) had a legal duty to point out this clause to Y. X's failure to do so, renders Y's material mistake reasonable.

The giving of appropriate advice

Y is not bound by the agreement with X because of the lack of actual and apparent consensus.

Total: [10]

1.2 Assignment 02

Question 1

A real agreement is an agreement

1 only creating obligations.
2 whereby a right is transferred.
3 only extinguishing a debt.
4 an example of which is release or discharge.
5 that cannot entail the transfer of ownership of property. (1)

Answer

2.

Discussion

See Hutchison and Pretorius (eds) *The law of Contract in South Africa* Oxford University Press Southern Africa 2009 4.

Question 2

Which of the following is *NOT* a requirement for the creation of a valid contract?

1 There must be agreement or ostensible agreement between the parties.
2 The contracting parties must have capacity to act.
3 The performance must be possible after the contract is concluded.
4 The contract must be legal.
5 Constitutive formalities must be complied with. (1)

Answer

3.

Discussion

Besides option 3, all the other options are requirements that are necessary for the creation of a valid contract. Regarding option 3, it is not a valid requirement. It would have been a valid requirement if it read, that "the performance must be possible ***when*** the agreement is entered into", and not ***after*** the contract is concluded. See Hutchison and Pretorius *Contract* 6.

Question 3

Portia and Lucas are married out of community of property. They want to purchase Jerome's car. Jerome offers to sell his car to Lucas for R100 000. Lucas and Portia accept Jerome's offer. Which statement is *CORRECT*?

1 Only Lucas could accept the offer.
2 Either Lucas or Portia could accept the offer as they are married.
3 Since the offer was only made to Lucas, the acceptance from both Portia and Lucas will never constitute a counter-offer.
4 A valid contract has been concluded, because Lucas is one of the parties that accepted the offer.
5 None of the above statements. (1)

Answer

1.

Discussion

The answer is option 1, because an offer can only be accepted by the person to whom it was made. In this question the offer was made to Lucas, therefore only Lucas can accept the offer. See *Bird v Summerville* 1961 (3) SA 194 (A); Hutchison and Pretorius *Contract* 55-56).

Question 4

X orally offers to sell her painting to Z for R20 000 on 1 April. In terms of the offer X stipulates that her offer will lapse on 30 April. On 15 April X notifies Z orally that she (X) revokes her offer. On 25 April Z notifies X orally that he (Z) accepts the offer. Which answer reflects the *CORRECT* legal position?

1 X gave a right of pre-emption to Z.
2 The revocation by X is valid, even though an option was concluded.
3 An option exists because X offered to keep her offer open until 30 April, which was accepted on 25 April.
4 X did not give an option to Z.
5 An option exists because there is an agreement to keep the main offer open for a certain time. (1)

Answer

4.

Discussion

Contracting parties may enter into an agreement in terms of which the offeror undertakes not to revoke his or her offer. In such a case, it is said that one party grants the other an option (Study Guide 26-27). For this question, an option does not exist because there is no agreement in place which binds X to keep his offer open until 30 April. X has unilaterally imposed this upon himself in the offer, but it was certainly not an agreement by both parties to hold X to his offer to keep it open until this date. It follows that option 4 is the correct answer. Note that a right of pre-emption also does not exist. A right of pre-emption occurs when a prospective seller undertakes as against a prospective purchaser to give the prospective purchaser preference if the prospective seller should decide to sell. The prospective purchaser thus acquires in terms of an agreement the right to be granted the first opportunity to buy the thing should the prospective seller decide to sell (Study Guide 31-32). Since there was no right of preference created in an agreement in this question, a right of pre-emption can also not exist.

Question 5

A right of pre-emption

1 is a right acquired by a contract.

2 is a right acquired by an offer.

3 is a right acquired in terms of an option.

4 is a preferential right entitling the grantee to compel the grantor to sell the thing in question at anytime.

5 encapsulates all of the above statements. (1)

Answer

1.

Discussion

A right of pre-emption occurs when a prospective seller undertakes as against a prospective purchaser to give the prospective purchaser preference if the prospective seller should decide to sell. The prospective purchaser thus acquires, in terms of an agreement (or contract), the right to be granted the first opportunity to buy the thing should the prospective seller decide to sell (Study Guide 31-33). Therefore a contract is required to create a right of pre-emption, and not just an offer. Note also that in terms of a right of pre-emption the grantor cannot be compelled to sell at anytime, it is only when the grantor decides to sell at his or her discretion, that the prospective purchaser has a right to have the first opportunity to buy the thing. A right of pre-emption is not acquired in terms of an option. These two types of rights differ by definition. See the discussion in question 4 regarding the definition of the latter.

Question 6

Y lets premises to X. The lease contains a clause prohibiting X from sub-letting the premises without the written consent of Y. A further clause of the lease requires that any variation of the terms of the lease (including this clause) has to be in writing and signed by both parties. Later Y and X agree orally that X can sub-let the premises. After X has sub-let the premises to a third party, Y changes his mind and informs X that both X and the sub-lessee (third party) should vacate the premises because X has breached the contract by subletting the premises. Which answer reflects the correct legal position?

1 X does not breach the contract, because the oral agreement constitutes a binding contract, based on the reliance theory.

2 X breaches the contract, because the oral agreement is not legally binding.

3 X does not breach the contract, because the oral agreement constitutes a binding tacit contract.

4 Y breaches the oral agreement and therefore X and the sub-lessee are entitled to remain on the premises.

5 X breaches the contract of lease and Y breaches the subsequent oral agreement. Therefore both parties are in equal guilt, entitling X as the possessor to remain on the premises. (1)

Answer

2.

Discussion

In this question, the facts indicate that the parties have stipulated a formality in their lease agreement. The formality in question is what is commonly referred to as a non-variation clause. This clause typically prohibits oral variation of the terms of a contract, unless it is reduced to writing and signed by both parties. In this context, an oral agreement by the parties to vary the terms of the contract is not legally binding, and can lead to one party breaching the contract, which is the case in this question. See *SA Sentrale Ko-operatiewe Graanmaatskappy Bpk v Shifren* 1964 (4) SA 760 (A) and Hutchison and Pretorius *Contract* 163-164.

Question 7

X and Y conclude a contract under circumstances wherein X threatened Y. This threat may be used to prove an element of

1 duress.

2 undue influence.

3 consensus that has been obtained in an improper manner.

4 contractual illegality.

5 material mistake. (1)

Answer

1.

Discussion

The presence of a threat is one of the elements that must be proved to establish duress (Hutchison and Pretorius *Contract* 136-141). None of the other options requires the existence of a threat to be proven as a requirement.

Question 8

The claim in question (7) is probably

1 delictual.

2 contractual.

3 based on enrichment.

4 based on positive malperformance.

5 fraudulent. (1)

Answer

1.

Discussion

Duress is a delict (Hutchison and Pretorius *Contract* 137).

Question 9

S, who lives in Upington, sends P, who lives in Grahamstown, a letter by private courier in which she offers to sell him her (S's) motorcycle, a collectors piece, for R100 000. She states in her letter that her offer will expire on 1 February. P accepts S's offer by letter which he posts on 31 January. S receives the letter on 7 February and only reads it on the next day. P tenders payment of R100 000 but S refuses to accept payment. Which theory applies to determine if a valid contract was concluded?

1 Expedition theory.

2 Reliance theory.

3 Information theory.

4 Reception theory.

5 Will theory. (1)

Answer

3.

Discussion

The material focus of this question is to consider if the information theory or the expedition theory applies. The information theory states that the agreement is concluded when and where the offeror learns or is informed of the acceptance, in other words, when the offeror reads the letter of acceptance. On the other hand, the expedition theory states that the contract comes into being when and where the offeree posts his or her letter of acceptance. But how does a person determine which theory applies to a particular situation or circumstance. In our law, the general rule is that the information theory applies. This means that as a general rule, a contract comes into being only when the acceptance is communicated to the mind of the offeror. However, exceptions to the general rule do exist, and one such exception is the expedition theory. This theory applies only when the following four criteria are met:

- the offer is made by post or telegram;
- the postal services are operating normally;
- the offeror has not indicated a contrary intention, expressly or tacitly; and
- the contract is commercial.

If all four criteria are met, then the expedition theory is applicable. If any of these criteria are not met, the information theory applies. In this question, the offer was not made by post, instead it was sent by private courier, Therefore the expedition theory does not apply. It follows that the information theory must be applied to determine if a valid contract was concluded. See Hutchison and Pretorius *Contract* 56-61.

Question 10

Assume the same facts in question (9). Which statement is *CORRECT*?

1 No valid contract was concluded.

2 A valid contract was concluded on 7 February in Upington.

3 A valid contract was concluded on the day after 7 February in Upington.

4 A valid contract was concluded on 31 January in Grahamstown.

5 An option contract was concluded in Grahamstown. (1)

Answer

1.

Discussion

The application of the information theory to this question reveals that no contract was concluded as the acceptance of the offer was only communicated to the mind of the offeror (S) on 7 February, which was after the offer lapsed on 1 February. It follows that if no contract was concluded, that options 2 to 5 are incorrect, and option 1 is correct.

Total: [10]

2012
Semester 2

This tutorial letter contains the memoranda of the answers to the assignments.

1.1 Assignment 01

Question

X, an organiser of art exhibitions, contracted with Y for an exhibition to be held on 24 to 27 July. These dates were the only dates mentioned during the negotiations. After having been pressurized by X, Y hurriedly signed the standard form contract without reading it. The contract contained a clause permitting X to change the dates of the exhibition unilaterally. Thereafter X changed the dates. X had no reason to believe that Y would have signed the contract if he had known of the term. Y averred that the contract was void. Will Y succeed in his attempt to have the contract set aside? Substantiate your answer and refer to relevant case law. Apply the **direct reliance approach** of the courts in answering this question. (10)

Answer

Identifying the problem

The facts seemingly indicate that X and Y have not reached consensus based on the will theory. If so, it is necessary to determine if Y may be held bound to a contract with X, based on the reliance theory, or whether Y will escape liability. Only the direct approach to the reliance theory will be considered.

Discussing the relevant law applicable to the problem, referring to the relevant case law, *AND* applying the law to the facts of the problem

The direct reliance approach can only be applied after it has been determined that Y acted under a material mistake. It must thus be determined whether agreement (*consensus ad idem*) as a contractual basis exists between the parties, as required in terms of the will theory.

Consensus has three elements (Hutchison and Pretorius (eds) *The law of Contract in South Africa* Oxford University Press Southern Africa 2009 14 85): the parties must seriously intend to contract, be of one mind as to the material aspects of the proposed agreement (the terms and the identity of the parties to it), and be conscious of the fact that their minds have met.

In the present case the parties were not in agreement as to the consequences they wished to create: Y thought that the dates for the art exhibition (X's performance) was fixed, while X knew that the contract allowed X to unilaterally change the dates. This is a mistake as to the obligations the parties wished to create which excludes *consensus* between the parties. No contract can arise on the basis of the will theory. This type of mistake can be illustrated with a number of cases.

In *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 (4) SA 164 (D) the mistake related to performance and was thus material. The plaintiff believed that he was purchasing the erf shown to him by the seller's agent, while the written contract that he signed indicated the correct erf which was a completely different property. His mistake related to performance and was material. See also in *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 889 (A), the appellant signed an agreement containing a term excluding the respondent from liability for misrepresentation. Finally see *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (2) SA 234 (A) where the appellant erred with regard the period of the lease which was an aspect of the performance.

The direct reliance approach (see Hutchison and Pretorius *Contract* 95-97 103-105) can thus be applied. The court stated the test in *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (2) SA 234 (A) 239-240:

> In my view, therefore, the decisive question in a case like the present is this: did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention? … To answer this question, a three fold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party's intention; secondly, who made that representation; and thirdly, was the other party misled thereby? … The last question postulates two possibilities: Was he actually misled and would a reasonable man have been misled?

By signing the contract, Y, a party to the contract, misrepresented her intention to be bound by the clause allowing X to unilaterally change the dates. X knew that the only dates mentioned during the negotiations were 24 to 27 July, that Y hastily signed the contract and that the contract had a clause allowing X to unilaterally change the dates. Although it could be argued that X was not actually misled by Y's misrepresentation, it is clear that a reasonable person would not have been misled. Indeed, X had no reason to believe that Y would have signed the contract had Y known of the term allowing X to change the dates of the exhibition unilaterally. In fact X had a legal duty to point out the presence of this clause in the agreement to Y. There was either no actual or at least reasonable reliance on the part of X.

The giving of appropriate advice

Y is not bound by the agreement with X because of the lack of actual and apparent consensus.

Total: [10]

1.2 Assignment 02

Question 1

An item displayed in a shop window, accompanied by presentation of payment for the item by a customer, generally

1 results in a contract being concluded because an offer and acceptance exists.
2 infers that the customer is the offeror.
3 infers that the customer is the offeree.
4 infers that neither an offer nor an acceptance exists.
5 infers that the customer merely indicates an invitation to do business. (1)

Answer

2.

Discussion

The South African courts have not yet decided this issue. However, it is likely that our courts will follow the ruling in the English case of *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1953] 1 QB 401 (CA), [1953] 1 ALL ER 482, where it was held that the customer makes the offer to purchase. See Hutchison and Pretorius (eds) *The law of Contract in South Africa* Oxford University Press Southern Africa 2009 52.

Question 2

The courts use the hypothetical bystander test when determining the possible existence of

1 *essentialia.*
2 *naturalia.*
3 terms implied by law.
4 tacit terms.
5 express terms. (1)

Answer

4. This question has been discounted in the marking of the assignment.

Discussion

See Hutchison and Pretorius *Contract* 245-246. Another name for the hypothetical bystander test is the officious bystander test.

Question 3

H lets a business premises to D for R5 000 per month. The written lease contains a clause prohibiting D from sub-letting the premises without the written consent of H. A further clause requires, that for any variation of the contract to be valid (including this clause), it has to be in writing and signed by both parties. Subsequently H and D orally agreed that D can sub-let the premises, for which D will pay an additional R2 000 per month. D then sub-let the premises to Y. After H received a rental income of R7 000 per month from D for a period of six months, he (H) cancels the lease agreement with D because D breached the contract by sub-letting the premises. Which answer reflects the correct legal position?

1 H validly cancelled the contract.
2 H's attempted cancellation has no effect on the validity of the contract.
3 Because H orally agreed that D can sub-let the premises, it is in fact H that has breached the lease agreement by cancelling the contract.
4 Because H collected an additional R2 000 per month for six months from D, the oral variation to the contract is valid.
5 The contractual relationship between the parties has become void for vagueness. (1)

Answer

1.

Discussion

The question deals with a non-variation clause. It was held in *SA Sentrale Ko-operatiewe Graanmaatskappy Bpk v Shifren* 1964 (4) SA 760 (A) that a non-variation clause was not against public policy and that no oral variation of the contract was effective if the clause entrenched both itself and all the other terms of the contract against oral variation. Generally, such clauses are valid and enforceable and therefore, if a contract is varied orally, the variation will have no legal effect. It follows that that the oral variation in the question has no legal effect, and therefore, the contract was validly cancelled by H, as a result of D's breach of the contract. See Hutchison and Pretorius *Contract* 163-164).

Question 4

Assume the same facts in question (3). Which issue is *NOT* relevant to a question of this nature?

1 Whether the non-variation clause is itself entrenched against oral variations.
2 Whether a later agreement should take precedence over a prior agreement.
3 Policy grounds based on freedom of contract.
4 Whether a prior agreement should take precedence over a later agreement.
5 Whether H was enriched by receiving an additional R2 000 for six months, at the expense of D. (1)

Answer

5.

Discussion

See the discussion in Hutchison and Pretorius *Contract* 163-164 from which it can be established that options 1 to 4 above are relevant and that option 5 is irrelevant as it relates to enrichment.

Question 5

Regarding restraint of trade agreements, what is the present legal position under South African law?

1 In line with English Law, freedom of trade takes precedence over the principle of sanctity of contract.
2 If a restraint is unreasonable then it is automatically rendered to be contrary to public policy.
3 A restraint of trade agreement that is contrary to public policy is void and unenforceable.
4 The onus to prove that enforcing a restraint would be against public policy is on the party who alleges that she is not bound by the restraint agreement.
5 A restraint of trade agreement cannot be partially enforceable. (1)

Answer

4.

Discussion

Initially, the courts gave preference to the English law position as stated in option 1. However, the court *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) overturned this approach in favour of sanctity of contract. It was held that a contract in restraint of trade is now valid and enforceable, unless the party wishing to escape the consequences of the agreement can prove that the restraint is contrary to public policy and thus unenforceable. The court further held that the restraint denier consequently bears the onus of proving that the enforcement of the agreement is contrary to public policy (confirmed in *Barkhuizen v Napier* 2007 (5) SA 323 (CC)). It was also held in *Magna Alloys* that an agreement in restraint of trade that is contrary to public policy is not void, but only unenforceable. *Magna Alloys* is also authority for the principle that an agreement in restraint of trade may be enforced partially. It was also decided in *Magna Alloys* that the reasonableness of a restraint as between the parties is only an indication of whether it probably is against public policy or not since another aspect of public policy may require that a reasonable restraint should not be enforceable or that an unreasonable restraint should be enforceable. See Hutchison and Pretorius *Contract* 193-198.

Question 6

Mark is engaged to Jane. Mark has a very strong personality and eventually persuades Jane to sell and transfer her house that is worth R900 000 to him at a purchase price of a mere R20 000. After registration of the property in Mark's name he breaks off the engagement. Which of the following requirement(s) is / are relevant for Jane to prove, in her pursuit to have the transfer of the house into Mark's name set aside?

(a) Mark exercised an influence over her.
(b) Mark exercised this influence over her, in an unscrupulous manner in order to induce her to consent to a transaction which is to her detriment and which she, with normal free will, would not have concluded.
(c) Mark gained this influence by standing in a position of trust in relation to her.
(d) This influence exercised by Mark over her, amounted to intimidation which was not imposed in good faith.

1 (a) and (d).
2 (a) and (b).
3 (a), (b) and (c).
4 (a), (b) and (d).
5 (a), (b), (c) and (d). (1)

Answer

2.

Discussion

It seems as though Mark unduly influenced Jane. Jane will thus have to prove all the requirements for undue influence. Only (a) and (b) are such requirements. The other requirement which is not mentioned in the question is that Jane would have to prove that the

influence Mark exercised over her weakened her powers of resistance and rendered her will compliant. A relationship of trust (option (c)) is not a requirement, but a relevant factor in proving undue influence. Option (d) is not a requirement for undue influence, but for duress. Hutchison and Pretorius *Contract* 137 141-142.

Question 7

Which cause of action is delictual?

1 Mistake.
2 Culpable misrepresentation.
3 Common error.
4 *Dictum et promissum*.
5 Impossibility of performance. (1)

Answer

2.

Discussion

The cause of action for option 2 is delictual (Hutchison and Pretorius *Contract* 113-115). The causes of action for all the other options are contractual.

Question 8

Which causes of action are likely to render the contract voidable?

1 Mistake and culpable misrepresentation.
2 The *iustus error* doctrine and duress.
3 The expedition theory and innocent misrepresentation.
4 Culpable misrepresentation and undue influence.
5 Undue influence and the reliance theory. (1)

Answer

4.

Discussion

Option 4 is correct as culpable misrepresentation and undue influence render the contract voidable at the instance of the innocent party. Option 1 is incorrect as mistake renders a contract void, even though culpable misrepresentation renders the contract voidable. Option 2 is also incorrect because the *iustus* error doctrine relates to error which rends a contract void, even if duress renders makes the contract voidable. Option 3 is incorrect as the expedition theory (which deals with contracts concluded by post) does not make a contract void or voidable, even if innocent misrepresentation renders a contract voidable. Option 5 is also incorrect as the reliance theory is an alternative basis for holding a party bound to a contract and does not make a contract void or voidable even if undue influence makes the contract voidable. See Hutchison and Pretorius *Contract* 57-61 91-107 116-142.

Question 9

Which statement (s) is/are **CORRECT** regarding unlawful contracts?

(a) Some unlawful contracts are void.
(b) Some unlawful contracts are not void because the legislature intended that the conclusion of such a contract should merely constitute a criminal offence that is punishable by way of a fine.
(c) All unlawful contracts are not enforceable.
(d) Some unlawful contracts are voidable.

1 (a) only.
2 (c) only.
3 (a) and (b).
4 (a), (b) and (d).
5 (a), (c) and (d). (1)

Answer

3.

Discussion

Some unlawful contracts are indeed void and option (a) is thus correct. Some unlawful contracts are furthermore not void as correctly set out in option (b) above (Hutchison and Pretorius *Contract* 179-180). Option (c) is incorrect because some unlawful contracts are void in accordance with the *ex turpi* rule. No illegal contracts are merely voidable and thus option (d) is incorrect. See Hutchison and Pretorius *Contract* 174 179-180 187). Therefore option 3 is correct.

Question 10

The aggrieved party may

1 be successful in instituting a delictual claim against the other contracting party, for the return of his performance in terms of an illegal contract, if the *in pari delicto* rule is relaxed.
2 be successful in instituting an unjustified enrichment claim against the other contracting party, for the return of his performance in terms of an illegal contract, if the *in pari delicto* rule is relaxed.
3 be successful in instituting a contractual claim against the other contracting party, for the return of his performance in terms of an illegal contract, if the *in pari delicto* rule is relaxed.
4 be successful in instituting a specific performance claim against the other contracting party, for the return of his performance in terms of an illegal contract, if the *in pari delicto* rule is relaxed.
5 not be successful in instituting any claim against the other contracting party, for the return of his performance in terms of an illegal contract, if the *in pari delicto* rule is relaxed. (1)

Answer

2.

Discussion

The question deals with whether or not the aggrieved party can claim the return of his performance in terms of an illegal contract that is void. This claim of restitution of whatever has been performed is based on unjustified enrichment. It is not a delictual claim (option 1), a contractual claim (option 3) or a specific performance claim (option 4). Option 2 is correct as the enrichment action can be instituted where the *par delictum* rule has been relaxed. Option 5 is incorrect, because an enrichment claim is possible if the *par delictum* rule is relaxed. See Hutchison and Pretorius *Contract* 199-201.

1.1 Assignment 01

Question

Albert takes his motor vehicle to Dodgy Motors for a service. On his arrival, he is asked to sign a "job card" by the owner. Albert enquires why he is required to sign the "job card" and the owner explains to him that by signing he is authorising them to conduct the service on his car which will cost R1 000. He signs the "job card" without reading it. While servicing the car, the service manager finds faults on the car (unrelated to the service) and he proceeds to do these additional repairs for a further R2 000. Albert refuses to pay for the additional repairs and argues that he did not authorise such repairs. The owner of Dodgy Motors argues that Albert is obliged to pay for the work done as the "job card" contains a contractual clause authorising Dodgy Motors to do any repairs on the motor vehicle which they deem necessary without asking the client's authorisation and requiring the client to pay for such repairs. Advise Albert on whether he is liable on the contract to pay Dodgy Motors R2 000 for the additional repairs. Substantiate your answer and refer to relevant case law. Apply the **direct approach** of the courts in answering this question. (10)

Answer

The essence of this problem is the question whether Albert and the owner of Dodgy Motors has reached actual consensus or ostensible consensus. Albert will not be contractually bound to pay for the additional repairs If this requirement for a valid contract is absent.

The first step is to determine whether agreement (*consensus ad idem*) exists between the parties, as required in terms of the will theory. Agreement has three elements (Van Aswegen et al *Law of Contract: only study guide for PVL301-W* (1996) 13):

* agreement between the parties as to the consequences they wish to create;
* agreement as to the intention of the parties to create legal consequences; and
* an awareness regarding their unanimity.

In the present case the parties were not in agreement as to the consequences they wished to create: Albert thought that he was authorising Dodgy Motors to only service his car, while the owner of Dodgy Motors knew that the contract also allowed Dodgy Motors to conduct repairs on the car which they deem necessary and which should be paid by Albert without any further authorisation from Albert. This was a mistake as to the obligations the parties wished to create and was a material mistake which excludes *consensus* between the parties. This means that no contract could arise on the basis of the will theory. This type of mistake can be illustrated with a number of cases.

In *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) the appellant signed a hotel register without reading it. The hotel register contained a term excluding the respondent from liability for certain acts. The appellant was unaware of this term and his mistake related to a term which he believed would not be in the contract and as such was material because it related to an aspect of performance.

In *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 (4) SA 164 (D) the plaintiff believed that he was purchasing the erf shown to him by the seller's agent, while the written contract that he signed indicated the another erf which was a completely different property. His mistake related to performance and was material.

The appellant signed a contract without reading it in *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 889 (A). The contract contained a term excluding the respondent from liability for misrepresentation Once again the mistake related to an aspect of performance.

In *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A) the parties concluded a 20-year notarial lease contract. A later addendum to the contract drafted by the appellant's attorney incorrectly indicated that the period of the lease was 15 years. Again the appellant signed the addendum without reading it. The appellant erred with regard the period of the lease which was an aspect of the performance.

However, the matter does not end here, because a party may be held contractually liable on the basis of a supplementary ground for liability, namely the reliance theory. In this regard you were asked to apply the direct reliance approach of the courts. Contractual liability is then based on the reasonable reliance that *consensus* has been reached which the one contractant (contract denier) creates in the mind of the other contractant (contract enforcer).

According to the *Sonap* case the direct reliance approach entails a threefold enquiry:

* Was there a misrepresentation regarding one party’s intention? In our problem Albert wanted his car to be serviced only. Dodgy Motors wanted the power to also unilaterally conduct repairs to the car, which it deemed necessary. By signing the contract Albert made a misrepresentation that his intention is the same as that expressed in the contract. This happened in the *Sonap* case as well.

* Who made the misrepresentation? In the problem it was made by a party to the contract, Albert.

* Was the other party actually misled by the misrepresentation and, if so, would a reasonable man also have been misled? Dodgy Motors in our problem could have been actually misled, but a reasonable man would have taken steps to point out to Albert that the contract allows Dodgy Motors to unilaterally conduct repairs on the car, because Albert enquired about the purpose of the “job card” and the owner of Dodgy Motors misled him to believe that by signing the card he is merely authorising the service to be done. In *Sonap* the court found that the contract enforcer knew that the contract denier was acting under a mistake with regard to the reduction of the term of the lease and consequently was not misled by the contents of the addendum. The addendum was thus void.

In our problem Albert did not create a reasonable reliance that he wished to be bound to the contract he signed. We can conclude that Albert is not contractually liable to pay R2 000 for the repairs. [This does not exclude the possibility that Albert may be liable for unjustifiable enrichment]

Total: [10]

1.2 Assignment 02

Question 1

Where a contract is concluded by email, which theory applies?

1 The declaration theory.
2 The expedition theory.
3 The reliance theory.
4 The reception theory.
5 The information theory. (1)

Answer

4.

Discussion

See section 22(2) of the Electronic Communications and Transactions Act 25 of 2002 (paragraph 10.2 van Tutorial Letter 101).

Question 2

S sends a written offer by post to P, in which S offers to sell his radio to P for R3 000. In the written offer, S stipulates that the acceptance must be communicated to him by 1 June. On 20 May, P posts a written acceptance to S, to purchase the radio for R3 000. On 22 May, S phones P and cancels his offer to sell his radio. P's written acceptance reaches S on 25 May. Which answer reflects the CORRECT legal position?

1 A contract is concluded between S and P, because the expedition theory applies.
2 A contract is not concluded between S and P, because the information theory applies.
3 A contract is concluded between S and P, because the information theory applies.
4 A contract is not concluded between S and P, because the expedition theory applies.
5 A contract is concluded between S and P, because the reception theory applies. (1)

Answer

2.

Discussion

Even though the written offer by S was sent by post, S specified that the acceptance must be communicated to him by 1 June. Therefore the expedition theory does not apply because the offeror (S) has expressly indicated that the information theory should apply. Before the acceptance of the offer could reach S, P revoked the acceptance. See Study Guide 28-33.

Question 3

A offers B her car for R20 000 cash. B answers: "I will buy your car for R19 000 cash." By this answer,

1 B accepts A's offer.
2 B accepts A's offer unequivocally.
3 B accepts and rejects A's offer.
4 B rejects A's offer and makes her (A) a counter-offer.
5 B complies with the requirement that the acceptance must not be ambiguous. (1)

Answer

4.

Discussion

An acceptance must be an unconditional and unequivocal acceptance of the whole offer. Any conditions or reservations attached to it, (like in the context of this question), constitutes a counter-offer, which the original offeror (A) may accept or reject (Study Guide 27).

Question 4

Where a culpable misrepresentation exists, the action which arises is based on

1 delictual liability.
2 unjustified enrichment.
3 estoppel.
4 statutory liability.
5 contractual liability. (1)

Answer

1.

Discussion

A culpable misrepresentation (which entails either a fraudulent or negligent misrepresentation) is a form of delict (distinct from contract and breach of contract), even if it is committed in a contractual setting (Study Guide 76).

Question 5

Sibongile is desperate to sell her house because of a termite infestation. Consequently she knowingly conceals all signs of damage when a potential purchaser, Thandi, comes to inspect the house and furthermore tells Thandi that there is nothing wrong with the house. Thandi purchases the house, which she would never have done if she knew of the termite infestation. What cause of action will Thandi be able to rely on in the circumstances?

(a) Dictum et promissum.
(b) Innocent misrepresentation.
(c) Culpable misrepresentation.
(d) Material mistake.

1 (a), (b) and (c).
2 (a) and (c).
3 (b) and (c).
4 Only (c).
5 Only (d). (1)

Answer

1.

Discussion

The wrongful precontractual false statement by Sibongile that there is nothing wrong with the house, knowing full well that the house has a termite infestation, constitutes a culpable misrepresentation (either fraudulent or negligent) (Study Guide 76-81). See also *Ranger v Wykerd and Another* 1977 (2) SA 976 (A) (Case Book 106).

This same statement by Sibongile is also a *dictum et promisum* as it satisfies the elements contained in the definition of this *dictum*, which is a material statement made by the seller to the buyer during the negotiations, bearing on the quality of the *res vendita* and going beyond mere praise and commendation (Study Guide 88-89). See also *Phame (Pty) Ltd v Paizes* 1973 (3) SA 397 (A) (Case Book 125).

Sibongile's statement is also an innocent misrepresentation (Study Guide 86-87).

Thandi's mistake that the house does not have a termite infestation relates to a characteristic of the thing which is not a material mistake (Study Guide 55 -56 76).

Question 6

Assume the same facts as in question (5). What remedy or remedies are available to Thandi when she discovers the termite infestation and damage to the house?

1 Thandi may *only* rescind the contract.
2 Thandi may *only* uphold the contract and claim damages.
3 Thandi may rescind the contract and claim damages.
4 Thandi may uphold the contract and claim damages.
5 Both 3 and 4. (1)

Answer

5.

Discussion

As we have seen in the discussion of question 5 Sibongile's statement amounts to innocent misrepresentation, a *dictum et promissum* and a culpable misrepresentation. The only remedy for innocent misrepresentation is rescission of the contract (Study Guide 87). The remedies for a *dictum et promissum* are the *actio redhibitoria* (cancellation) and the *actio quanti minoris* (reduction of price). The remedies for culpable misrepresentation are firstly, rescission of the contract or upholding the contract, and secondly, whether Thandi rescinds or upholds the contract, she may also claim damages to compensate her for her actual loss (Study Guide 88). Note that the position is not so clear if Thandi could have cancelled the contract, in the scenario where she still would have entered into the contract had she known about the culpable misrepresentation (Study Guide 82). But his is not the position here.

The only options reflecting the above remedies are 3 and 4. Thus 5 is the correct option.

Question 7

In which case did the seller not reveal to the purchaser that the swimming pool was not structurally sound because it leaked?

1 *Trotman and Another v Edwick* 1951 (1) SA 443 (A).
2 *De Jager v Grunder* 1964 (1) SA 446 (A).
3 *Ranger v Wykerd and Another* 1977 (2) SA 976 (A).
4 *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (A).
5 *Phame (Pty) Ltd v Paizes* 1973 (3) SA 397 (A). (1)

Answer

3.

Discussion

Read the prescribed cases mentioned again.

Question 8

The aggrieved party may be successful in instituting

1 a delictual claim against the other contracting party, for the return of his performance in terms of an illegal contract, if the *in pari delicto* rule is relaxed.
2 an unjustified enrichment claim against the other contracting party, for the return of his performance in terms of an illegal contract, if the *par delictum* rule is relaxed.
3 a contractual claim against the other contracting party, for the return of his performance in terms of an illegal contract, if the *in pari delicto* rule is relaxed.
4 a specific performance claim against the other contracting party, for the return of his performance in terms of an illegal contract, if the *in pari delicto* rule is relaxed.
5 (3) and (4). (1)

Answer

2.

Discussion

All these options refer to aggrieved party claiming the return of his performance in terms of an illegal contract. An illegal contract is void and thus this claim of restitution of whatever has been performed is based on unjustified enrichment. It is not a delictual claim (option 1), a contractual claim (option 3) or a specific performance claim (option 4). Option 2 is correct as the enrichment action can be instituted where the *par delictum* rule has been relaxed (Study Guide 132-134).

Question 9

The consequences of an illegally concluded contract were discussed in

1 *Jajbhay v Cassim* 1939 AD 537.
2 *Brandt v Spies* 1960 (4) SA 14 (E).
3 *Neethling v Klopper* 1967 (4) SA 459 (A).
4 *Goldblatt v Fremantle* 1920 AD 123.
5 *Nel v Cloete* 1972 (2) SA 150 (A). (1)

Answer

1.

Discussion

Read the prescribed cases mentioned again.

Question 10

Where ambiguous words in a clause in a contract are interpreted in such a way that the least possible burden is placed on the debtor, and the clause is interpreted against the party in whose favour it was inserted, this is consistent with

1 the primary rules of interpretation.
2 the secondary rules of interpretation.
3 the tertiary rules of interpretation.
4 the parol evidence rule.
5 the *pactum in favorem tertii*. (1)

Answer

3.

Discussion

See Study Guide 158.

Total: [10]

2010 ASSIGNMNETS

This tutorial letter contains the memoranda of the answers to the assignments.

1.1 Assignment 01

Question

S, who lives in Upington, sends P, who lives in Grahamstown, a letter by post in which she offers to sell him her (S's) motorcycle, a collectors piece, for R100 000. She states in her letter that her offer will expire on 1 February at 24h00. P phones S on 1 February at 19h00, but S and her husband is out for the evening. P leaves a message on S's voice mailbox accepting S's offer. S only listens to P's message on 2 February. P tenders payment of R100 000 but S refuses to accept payment. Did a valid contract of sale arise between S and P? Advise P. Substantiate your answer. (10)

Answer

The question is whether P has accepted S's offer in time and thus whether S and P have reached consensus. S's offer lapses after the time that she has prescribed for acceptance (Van Aswegen et al *Law of Contract: only study guide for PVL301-W* (1996) 23). The problem is that although P accepted the offer in time, S was only informed of the acceptance after the time set for the lapse of the offer.

The general rule is that acceptance must be communicated to the offeror for consensus to arise (*R v Nel* 1921 AD 339 344; *Cape Explosives Works Ltd v South African Oil and Fat Industries Ltd; Cape Explosives Works Ltd v Lever Brothers (South Africa) Ltd* 1921 CPD 244 276; *Smeiman v Volkersz* 1954 4 SA 170 (C) 179). This rule flows from the principle that actual and conscious agreement between the parties form the primary basis for contractual liability (Van Aswegen et al *Law of Contract: only study guide for PVL301-W* (1996) 15 and 29). The parties must be aware of their unanimity (Van Aswegen et al *Law of Contract: only study guide for PVL301-W* (1996) 15).

This not a case of a contract concluded by telephone (*S v Henckert* 1981 (3) SA 445 (A)) as only the acceptance by P was by telephone. The Electronic Communications and Transaction Act 25 of 2002, which applies the reception theory to contracts concluded with data messages, does not apply furthermore as the definition of "data message" does not include purely voice messages such as telephone conversations even where the message is stored as a voice message (Tutorial Letter 101/3/2010 32).

The offeror may, however, expressly or tacitly waive his right to notification of acceptance (*R v Nel* 1921 AD 339 344; *Cape Explosives Works Ltd v South African Oil and Fat Industries Ltd; Cape Explosives Works Ltd v Lever Brothers (South Africa) Ltd* 1921 CPD 244 256 276; *Smeiman v Volkersz* 1954 4 SA 170 (C) 176 179). S did not expressly do so as the offer contains no words to that effect, but S tacitly did so by making her offer by post. She had tacitly indicated that her offer was accepted as soon as P posted his letter of acceptance (*Cape Explosives Works Ltd v South African Oil and Fat Industries Ltd; Cape Explosives Works Ltd v Lever Brothers (South Africa) Ltd* 1921 CPD 244 256 276; *Smeiman v Volkersz* 1954 4 SA 170 (C) 176 179; Van Aswegen et al *Law of Contract: only study guide for PVL301-W* (1996) 30-31)). P is not obliged to accept by post and

he has not in fact done so (he phoned S and left a message on her voice mailbox). In such a case, S's tacit waiver does not apply but the general rule applies. We can conclude that S and P did not reach agreement before S's offer lapsed.

Total: [10]

1.2 Assignment 02

Question 1

In which case was it decided that advertisements are usually mere invitations to the public to do business?

1 *Crawley v Rex* 1909 TS 1105.
2 *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 (4) SA 164 (D).
3 *R v Nel* 1921 AD 339.
4 *Steyn v LSA Motors Ltd* 1994 (1) SA 49 (A).
5 None of the above. (1)

Answer

1.

Discussion

Read the prescribed cases mentioned again.

Question 2

In *Bird v Sumerville* 1961 (3) SA 194 (A) the court found that

1 a person cannot accept an offer of which he is not aware.
2 an offer must be accepted by the person to whom it was addressed.
3 an acceptance must be a reaction to the offer.
4 an acceptance must comply with any formalities set by law or by the offeror.
5 an acceptance must be unconditional and unequivocal. (1)

Answer

2.

Discussion

Read the prescribed cases mentioned again and see Study Guide 27.

Question 3

Y offers to sell his BMW motor car to Z on 1 July, for R50 000. One of the terms of Y's offer is that the offer lapses on 30 August. However, on 20 July Y notifies Z that the offer is cancelled. Z insists that the offer is valid until 30 August and on 25 July Z notifies Y that he (Z) accepts the offer. Which answer reflects the correct legal position?

1 A pre-emption contract was not concluded between Y and Z.
2 An option contract was not concluded between Y and Z.
3 An option contract was concluded between Y and Z.
4 1 and 2.
5 None of the above. (1)

Answer

4.

Discussion

For a pre-emption contract or an option contract to exist there must firstly be an agreement between Y and Z in this regard. There is no such agreement between Y and Z. The stipulation that the offer lapses on 30 August is not an offer to keep the offer to sell open until 30 August. Therefore no option contract exists. No pre-emption contract exists, as there is no agreement between Y and Z giving the latter a preferential right to purchase the BMW (Study Guide 43).

Question 4

John owns a business. During the period 1 February to 31 March he unknowingly operates his business in contravention of a statute which requires him to have a trading license. This statute only criminalises the operation of a business without a trade license. On 15 February John sells goods on credit to Steve for R2000. John delivers the goods to Steve. When the price is due and payable on 20 February, Steve refuses to pay John. Steve argues that he is not obliged to pay John, as John did not have a trading license on 15 February. Which answer is *CORRECT*?

1 John may always claim back the goods from Steve, or if it no longer exists, the value thereof, based on an unjustified enrichment claim.
2 The contract is illegal and therefore unenforceable.
3 Under certain circumstances John may claim back the goods from Steve, or if it no longer exists, the value thereof, based on an unjustified enrichment claim.
4 John may enforce the contract and claim R2000 from Steve.
5 2 and 3. (1)

Answer

4.

Discussion

John and Steve have concluded a contract of sale. The statute only criminalises the operation of the business without a trading license. To also invalidate the contract between John and Steven would lead to an unreasonably inequitable result to innocent members of the public who buy from the business, and therefore is unlikely to have been the intention of the legislator. Therefore the validity of the contract is not affected and remains enforceable (Study Guide 115).

Question 5

Gary, a breeder of stud bulls, sells a bull to Piet for an agreed price. Gary knew that Piet required the bull for breeding purposes, although this fact is not mentioned in the contract. Subsequently it turns out that the bull is infertile and Piet wishes to cancel the contract. Which cause of action will Piet be able to rely on?

1 Breach of a term implied by law that the stud bull is fertile.
2 Breach of a tacit term that the stud bull is fertile.
3 Breach of a tacit term that the stud bull will not have any latent defect.
4 Breach of an express term agreed upon by the conduct of the parties that the stud bull is fertile.
5 None of the above. (1)

Answer

2.

Discussion

It is a tacit term that the bull is fertile. Although it is not mentioned in the contract, it appears obvious to both parties that the bull should be fertile. Gary knew that Piet was purchasing the bull for breeding purposes. Tacit terms are implied in the contract where both parties intended a term to form part of a contract but failed to expressly mention it because they thought that it was too obvious to do so. Such terms are also implied in a contract where both parties did not contemplate such a term at the time of contracting, but if they were asked about it at the time of contracting by someone, both parties would have agreed to include the term in the contract. This is consistent with the hypothetical bystander test (Study Guide 155). The facts in this question are similar to the facts in *Minister van Landbou-Tegniese Dienste v Scholtz* 1971 (3) SA 188 (A) where the court found that it was a tacit term that the bull was fertile.

Question 6

Which case is applicable to the facts in question (5)?

1 *Trotman v Edwick* 1951 (1) SA 443 (A).
2 *Van den Berg v Tenner* 1975 (2) SA 268 (A).
3 *Sweet v Ragerguhara NO* 1978 (1) SA 131 (D).
4 *Goldstein and Wolff v Maison Blanc (Pty) Ltd* 1948 (4) SA 446 (C).
5 *Minister van Landbou-Tegniese Dienste v Scholtz* 1971 (3) SA 188 (A). (1)

Answer

5.

Discussion

Read the prescribed cases mentioned again.

Question 7

The case in question (5) provides an excellent example of the distinction between

1 *naturalia* and tacit *incidentalia* of a contract.
2 *accidentalia* and *incidentalia* of a contract.
3 *incidentalia* and an *essentialia* of a contract.
4 *essentialia* and *naturalia* of a contract.
5 *essentialia* and *accidentalia* of a contract. (1)

Answer

1.

Discussion

See the commentary on *Minister van Landbou-Tegniese Dienste v Scholtz* 1971 (3) SA 188 (A) in the case book (Case Book 168-169).

Question 8

Which case would you refer to as authority on the effect of a contractual clause excluding liability for misrepresentation?

1 *Goldblatt v Fremantle* 1920 AD 123.
2 *Neethling v Klopper* 1967 (4) SA 459 (A).
3 *Broodryk v Smuts* 1942 TPD 47.
4 *Wells v SA Alumenite Co* 1927 AD 69.
5 *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A). (1)

Answer

4.

Discussion

Read the prescribed cases mentioned again and see Study Guide 90.

Question 9

While doing window-shopping, X and his fiancée, Y, see a ring displayed in a shop window. They immediately enter the jeweller's shop and offer to buy the ring at the displayed price. They find out to their dismay that the "diamond" is a synthetic diamond afterwards. Which statement is CORRECT:

1 The contract of sale is void.
2 The error is an *error in substantia*.
3 The error is an *error in corpore*.
4 The jeweller made a *dictum et promissum* that the ring was a diamond ring.
5 The parties to the contract did not want to buy and sell the same ring. (1)

Answer

2.

Discussion

The error is an error with regard to a characteristic of the subject matter of the contract and therefore it is an *error in substantia* (Study Guide 55). Such an *error* is not material (Study Guide 55) and the contract of sale is therefore not void. The error by X and Y does not relate to the identity of the subject matter (*error in corpore*) as both parties wanted to buy and sell the same ring (Study Guide 54-55). The jeweller did not make a positive statement about the diamond in the ring and it does not amount to a *dictum et promissum* (Study Guide 88-89 and Case Book 106 for the definition of a *dictum et promissum*). The parties wanted to buy and sell the same ring, therefore option 5 is incorrect.

Question 10

"Our law allows a party to set up his own mistake in certain circumstances in order to escape liability under a contract into which he has entered. But where the other party has not made any misrepresentation and has not appreciated at the time of acceptance that his offer was being accepted under a misapprehension, the scope for a defence of unilateral mistake is very narrow, if it exists at all." In which case does this statement appear?

1 *Du Toit v Atkinson Motors Bpk* 1985 2 SA 889 (A).
2 *George v Fairmead (Pty) Ltd* 1958 2 SA 465 (A).
3 *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 4 SA 164 (D).
4 *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 2 SA 473 (A).
5 *Steyn LSA Motors Ltd* 1994 1 SA 49 (A). (1)

Answer

4.

2009 ASSIGNMNETS

1.1 Assignment 01

Question

X is on her way from work and sees a white bull terrier bitch hiding in a doorway. Being an animal lover, she takes the dog home with her. The next day, she sees the following advertisement in the newspaper:

> Lost in Johannesburg City Centre on 27 May. Pedigree white bull terrier bitch with black patch over left eye. Answers to the name of Beauty. Reward of R1 000 for information leading to safe return. Tel 011 555 5555.

She realises that the dog she found matches the description given. She calls the advertiser who rushes over to be joyfully united with Beauty. In his joy, Beauty's owner, Y, seems to forget about the reward and X wishes to claim it from him. Will she be successful? Substantiate your answer. (10)

Answer

X will only be successful in her claim if a valid contract arose between X and Y and this will be the case if there was a valid acceptance of a valid offer. Y's advertisement complies with the requirements for a valid offer:

1 Y's offer was definite and complete. The offer in this problem contained adequate information to enable the addressee to form a clear idea of exactly what the offeror had in mind as it stated what was required for the offer to be accepted (information leading to the safe return of Beauty) and what amount the reward (R1 000) was.

2 Y's offer contemplated acceptance and a resultant obligation. Although an advertisement is usually only an invitation to do business (*Crawley v Rex* 1909 TS 1105), a promise of reward does constitute a firm offer (*Bloom v American Swiss Watch Co* 1915 AD 100). Y's offer was a firm offer and not a tentative statement with a possible agreement in mind.

3 Y's offer came to the attention of the addressee, X. The fact that an agreement is a conscious or stated mutuality of consent (*McKenzie v Farmers Cooperative Meat Industries Ltd* 1922 AD 16) leads to the requirement that the offeree must have knowledge of the offer to be able to react to it (*Bloom v The American Swiss Watch Co* 1915 AD 100).

4 An offer such as a promise of reward can be validly directed at undefined persons.

The providing of information by X was a valid acceptance of Y's offer:

1 X's acceptance was unconditional and unequivocal.

2 X, as a member of the public, could accept the offer of reward because the offer was addressed to the public in general.

3 X was aware of the offer of reward and her acceptance was thus a reaction to the offer (*Bloom v American Swiss Watch Co* 1915 AD 100). X's giving of information was a manifestation of her intention to accept the offer.

4 X's acceptance complies with the requirement set by Y that acceptance must take the form of the provision of certain information (*Carlill v Carbolic Smoke Ball Co* (1893) 1 QB 256).

It can be concluded that a valid contract arose in this problem, because Y made a valid offer which X validly accepted.

See Study Guide 13-15, 18-23 and 27-28.

Total: [10]

1.2 Assignment 02

Question 1

X, who lives in Cape Town, writes a letter to Y, who lives in Johannesburg. In the letter, she offers to sell her house to Y for R900 000. She posts the letter in Stellenbosch while visiting her daughter. A week later Y receives the letter, reads it, and immediately phones X on her landline. Y requests X to keep her offer open for a week and she undertakes to do. A day before the option expires, X phones Y and revokes her offer to sell her house. Y immediately posts a letter of acceptance in which he exercises the option. X only receives this letter a week later. Which statement is **CORRECT**?

1 The substantive offer to sell the house does not contain all the *essentialia* of a contract of sale.
2 The option contract is valid.
3 The option contract was exercised too late as Y's letter of acceptance only reached X after the option lapsed.
4 According to the courts, X can validly revoke her offer to sell her house before Y exercises the option.
5 The option contract is concluded in Cape Town. (1)

Answer

2.

Discussion

In this problem we have two possible contracts: an option contract and a contract of sale (Study Guide 37). If valid contracts arose, the question is where and when these contracts were concluded. X makes a valid offer to sell her house by post, because it complies with the formalities required by the Alienation of Land Act 68 of 1981. It is a written letter, the contract contains all the *essentialia* of a contract of sale (the thing sold is identified and the price is determined) and the parties are identified. A letter is furthermore usually signed. Although the option contract is oral, it is valid since the substantive offer (X's offer to sell her house) is in writing. The option contract is concluded by phone and the normal rule, the information theory, applies to its conclusion. The option contract is concluded in Johannesburg, because that is where Y heard that his offer for X to keep the substantive offer open has been accepted (Study Guide 29 33). The courts have held that the substantive offer cannot be validly revoked before it is accepted (the exercise of the option) (Study Guide 38). The substantive offer was made by post and this is regarded as a tacit authorisation of Y to accept the offer by post (Study Guide 30-31). The contract of sale is concluded when and where the letter of acceptance has been posted ie a day before the option expires in Johannesburg. The option is exercised in writing and thus the contract of sale is in writing (Study Guide 40-41). The required signature is also present.

Question 2

To the facts of which case can the *iustus error* approach not be applied?

1 *Steyn v LSA Motors Ltd* 1994 1 SA 49 (A).
2 *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* 1992 3 SA 234 (A).
3 *Du Toit v Atkinson's Motors Bpk* 1985 2 SA 893 (A).
4 *George v Fairmead (Pty) Ltd* 1958 2 SA 465 (A).
5 *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 2 SA 473 (A).

Answer

1.

Discussion

In order to be applied, the *iustus error* approach requires at least an apparent contract. In the *Steyn* case there were no coinciding expressions of intention and the court applied the direct reliance theory (Study Guide 67).

Question 3

Which case will you consult as authority on the exclusion of a party's liability for misrepresentations in a contractual clause?

1 *Bayer South Africa (Pty) Ltd v Frost* 1991 4 SA 449 (A).
2 *Ranger v Wykerd* 1977 2 SA 976 (A).
3 *Trotman v Edwick* 1951 1 SA 443 (A).
4 *De Jager v Grunder* 1964 1 SA 446 (A).
5 *Wells v SA Alumenite Co* 1927 AD 69. (1)

Answer

5.

Discussion

Read the prescribed cases mentioned again.

Question 4

S illegally sells uncut diamonds to P for R10 000.00. Both S and P know that the selling of uncut diamonds is prohibited by statute. Although S delivers the diamonds to P, P fails to pay the purchase price. Which statement is **CORRECT**?

1 S will be able to claim the purchase price from P.
2 The contract sale is void on the basis of illegality.
3 The contract of sale is voidable on the basis of illegality.
4 S shall be able to claim return of the diamonds from P with an enrichment action, because the court as a rule will relax the *par delictum* rule.
5 S shall be able to claim return of the diamonds from P with an enrichment action because *par delictum* rule does not apply in the circumstances. (1)

Answer

2.

Discussion

The selling of uncut diamonds is prohibited by statute and the contract of sale is consequently void, not voidable (Study Guide 114-115). Performance in terms of a void contract cannot be enforced. S will be able to claim back the uncut diamonds with an enrichment action, but this claim will be prevented by the *in pari delicto* rule as both parties are equally guilty. Whether a court will relax the *in pari delicto* rule depends on the circumstances of each case and it cannot be said that as a rule it will be relaxed in these circumstances. See on the consequences of an illegal contract Study Guide 132-134.

Question 5

X buys a stand from Y for R300 000. Both X and Y honestly believed that business rights existed on the stand. They were also aware of each other's belief. Later it emerges that no such rights exist. Which statement is **INCORRECT**?

1 The contract is void if it does not comply with the Alienation of Land Act 68 of 1981.
2 Both X and Y act under a mistake regarding an attribute or characteristic of the subject matter of the contract.
3 *Dickensen Motors (Pty) Ltd v Oberholzer* 1952 1 SA 443 (A) is a case which is applicable to this problem.
4 *Fourie v CDMO Homes (Pty) Ltd* 1982 1 SA 21 (A) is a case which is applicable to this problem.

5 The contract is voidable because both X and Y has been unduly influenced by their belief in the existence of business rights. (1)

Answer

5.

Discussion

This is a contract of sale of land and should be in writing and signed by the parties to be valid (Study Guide 139). The mistake relates to a characteristic of the stand and not the identity of the stand (Study Guide 54-55). X and Y could be acting under a common mistake or even supposition and thus the two cases could be applicable. See the Study Guide 72-73 168 and read the two cases. Undue influence occurs where one unduly influences the other party (Study Guide 102) and cannot find application here.

Question 6

X purchased Y's shareholding in a particular company. The principle asset of the company was a shopping centre which was rent producing. Y was aware of the fact that X was interested in the shares because of the income the shopping centre generated. Y presented to X that the municipal rates were much lower than what they actually were. X would not have bought the shares if he had known the truth regarding the municipal rates. The contract of sale is voidable, because

(a) Y made an innocent misrepresentation.
(b) Y made a *dictum et promissum*.
(c) Y made a guilty misrepresentation.
(d) Y caused X to act under a mistake over a characteristic of the thing purchased.

1 All the possibilities.
2 (a), (b) and (c).
3 (b), (c) and (d).
4 (b) and (c).
5 (a) and (b). (1)

Answer

2.

Discussion

An innocent misrepresentation can give rise to rescission of the contract and restitution. As this is a contract of sale, Y's presentation to X amounts to a *dictum et promissum* and X will be able to claim rescission of the contract with the *actio redhibitoria*. Y's presentation will also amount to a culpable misrepresentation and the contract can be cancelled with the *actio empti*. X's error is only an error with regard to a characteristic of the shares which is not a material error. See Study Guide 76-83 86-88.

Question 7

The facts of **question 6** are based on the facts of:

1 *Phame (Pty) Ltd v Paizes* 1973 3 SA 397 (A).
2 *Ranger v Wykerd* 1977 2 SA 976 (A).
3 *Trotman v Edwick* 1951 1 SA 443 (A).
4 *De Jager v Grunder* 1964 1 SA 446 (A).
5 *Bayer South Africa (Pty) Ltd v Frost* 1991 4 SA 559 (A). (1)

Answer

1.

Discussion

Read the prescribed cases mentioned again.

Question 8

P buys an erf from S for R300 000. During the negotiations S points a different erf out to P than the one described in the written contract of sale. What type of mistake does P make?

1 *Error in negotio*.
2 *Error in substantia*.
3 *Error in corpore*.
4 *Error in persona*.
5 Error in motive. (1)

Answer

3.

Discussion

This error relates to the identity of the erf which has been sold. See Study Guide 54.

Question 9

Which statement is **INCORRECT**?

1 In *Jurgens Eiendomsagente v Share* 1990 4 SA 664 (A) the court held that the obligation to furnish a guarantee of the payment of the purchase price was a suspensive time clause.
2 In *Saambou-Nasionale Bouvereniging v Friedman* 1979 3 SA 978 (A) the court had to decide whether a cheque had a *justa causa*.
3 In *Vasco Dry Cleaners v Twycross* 1979 1 SA 603 (A) the court found that the contract of sale was simulated.
4 In *Broodryk v Smuts* 1942 TPD 47 civil servants threatened the plaintiff with internment if he refused to join the army.

5 The court held that the *exceptio doli generalis* was never part of the Roman-Dutch law in *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A). (1)

Answer

1.

Discussion

Read the prescribed cases mentioned again.

Question 10

In which case was the hypothetical bystander test for tacit terms applied?

1 *Fourie v CDMO Homes (Pty) Ltd* 1982 (1) SA 21 (A).
2 *Van den Berg v Tenner* 1975 (2) SA 268 (A).
3 *Jurgens Eiendomsagente v Share* 1990 (4) SA 664 (A).
4 *Minister van Landbou-Tegniese Dienste v Scholtz* 1971 (3) SA 188 (A).
5 *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A). (1)

Answer

2.

Discussion

Read the prescribed cases mentioned again.

Total: [10]

2 AMENDMENT OF THE STUDY MATERIAL

2.1 Delete the first paragraph on page 117 of the Study Guide and replace it with the following:

The law attaches three possible legal consequences to wagers (gambling):

(1) Some wagers are entirely valid and enforceable. Licensed gambling activities are the prime example. Unlicensed lawful gambling activities have the consequences the common law prescribe. Such gambling activities thus can be valid and enforceable if the parties have an independent interest in the outcome of the gambling activity.
(2) Most wagers are tacitly prohibited by statute and void. Examples are wagers by people who may not gamble (minors and people registered as excluded persons) and unlawful gambling.
(3) Certain gambling activities are unenforceable, but not void in terms of the common law. Examples are certain forms of social gambling and informal bets.

See the National Gambling Act 7 of 2004.

OVERVIEW OF FORMATION OF CONTRACT

CONTRACT FORMED BY MEANS OF:

OFFER

Requirements

(1) Must be firm
(2) Must be complete
(3) Must be clear and certain
(4) Must be in plain & understandable language(CPA)
(5) Must indicate if goods are reconditioned or gray(CPA)
(6) Negative option marketing prohibited(CPA)
(7) Offeree entitled to cooling-off period (CPA)
(8) Catalogue marketing-special requirements(CPA)

II Offers to public

1. Advertisement = invitation to do business (*Crawley v Rex)*
2. Promise of reward = offer to public (*Bloom v American Swiss Watch Co)*
3. Tender = invitation to elicit an offer
4. Auction
   - Simple Auction-bidder makes offer
   - Subject to conditions
     - With reserve-auctioneer invites offers; notice of auction must be given in advance (CPA); Notice of a right to bid by or on behalf of owner/auctioneer to be given in advance (CPA)
     - Without reserve-auctioneer makes offer

III Termination of offer

(1) Rejection of offer
(2) Death
(3) Effluxion of time
(4) Revocation of offer

IV Ancillary agreements-*Pacta de contrahendo*

Option = an agreement to keep offer open for a certain period

Constitutes 2 offers
- Consists of offer to enter main agreement e.g. contract of sale
  And
- Agreement to keep main offer open

Legal effect of option
- May not withdraw offer
- Must do nothing to prevent coming into existence

(Offer irrevocable)

Consequences
- Option holder accepts by exercising option, contract is created
- Breach option contract invokes remedy
  - Interdict
  - Damages

Termination
1) Effluxion of time
2) Death of grantor/grantee
3) Refusal
4) Lapse of right

Formalities
1) Orally
2) May be ceded

Right of preference=seller undertakes to give purchaser preference
If or when he/she decides to sell

Requirements – all requirements for contracts in general
Legal Nature –entails a negative obligation not to alienate to a third party

Breach of preferential right
- Interdict preventing alienation to third party
- Specific performance uncertain (*Associated SA Bakeries (Pty) Ltd v Oryx and Vereinigte Backereien(Pty) Ltd*

ACCPETANCE

Requirements
(1) Must be unqualified
(2) Must be by person to whom offer was made
(3) Must be conscious response to offer

Takes effect
- *Inter praesentes*-immediately
- *Inter absentes* – four theories
  - Information Theory (General Rule)
  - Declaration Theory
  - Reception Theory
  - Expedition Theory(postal contracts) (*Cape Explosives Works Ltd v South African Oil & Fat Industries)*

Requirements
(1) Offer made by post or telegram
(2) Postal services operate normally
(3) Offeror must not indicate contrary intention

Exceptions
(1) Telephone
(2) Telex/fax/email

LAW OF CONTRACT NOTES:

Contract as an agreement intended to create enforceable obligations

A contract is an agreement between two or more parties.
The extra ingredient that distinguishes contracts from non-binding agreements is a serious intention to create legally enforceable obligations (***animus contrahendi***).
The absence of an *animus contrahendi* explains why 'gentlemen's agreements' are not enforceable as contracts.

Legally binding agreements that are not contracts:

The fact that the parties seriously intend their agreement to have a binding legal effect does not necessarily mean that it is a contract.

1.1. **Obligationary agreements** (eg. Sale), whereby one or more obligations are created
1.2. **Absolving agreements**, whereby obligations are discharged or extinguished; and
1.3. **Real** (or **transfer**) **agreements**, whereby rights are transferred.

Definition of a contract

A **contact** may be defined as an agreement entered into by two or more persons with the intention of creating a legal obligation or obligations. A further element exists – namely, that the agreement should be one that the law recognizes as being binding on the parties.

Requirements for a valid contract

- **Consensus:** the minds of the parties must meet (or at least appear to meet) on all material aspects of their agreement;
- **capacity:** the parties must have the necessary capacity to contract;
- **formalities:** where the agreement is required to be in certain form (for example, in writing and signed), these formalities must be observed;
- **legality:** the agreement must be lawful – that is, not prohibited by statute or common law;
- **possibility:** the obligations undertaken must be capable of performance when the agreement is entered into; and

- **certainty:** the agreement must have a definite or determinable content, so that the obligations can be ascertained and enforced.

The nature of a contract

A contract is a **juristic act.** The conclusion of a contract is **bilateral** or multilateral. There must be at least two parties to an agreement.
A contract entails promises or **undertakings** on one or both sides.
Most contracts entail **reciprocity**.

Contract and the law of obligations

The law of contract forms part of the law of obligations.

Obligations – is a juristic bond i.t.o. which the party or parties on the one side have a right to a performance and the party or parties on the other side have a duty to render that performance.
In other words, it is a legal relationship between 2 or more legal subjects.

Sources of obligations are derived from the following:

(1) contract
(2) delict
(3) from other causes:
- Undue enrichment.
- Family relationships.
- Negotiorum gestio.
- Exercising of administrative authority.

There are as many obligations as there are indivisible performances owing under the contract, and it is these obligations which henceforth govern the relations between the parties to the contract.

A distinction is made between civil (obligatio civilis) and natural obligations (obligatio naturalis).
Civil obligation may be enforced directly by recourse to a court of law, whereas a natural obligation may not.
However, a natural obligation does have some legal effect: it's a legal relationship as apposed to a moral relationship.

Void and voidable contracts

The fact that a contract is valid when it was concluded, however, does not mean that it cannot be challenged subsequently.

The contract may for example, be terminated because the performance has become impossible or illegal; or one of the contracting parties may cancel because of the other's breach of contract; or one of the parties may cancel the contract because of the other's misrepresentation, duress or undue influence.

So, too, a material mistake will have the result that a contract is void (that is no contract comes into existence) since it excludes the basic requirement for the existence of a contract, namely consent.

The concept of obligation

An **obligation** is a legal bond between two or more persons, obliging the one (the **debtor**) to give, do, or refrain from doing something to or for the other (the **creditor**) to demand a performance by the debtor, and the duty of the debtor to make that performance.
The legal relationship created by an obligation is a personal one.
If the obligation is enforceable by action in a court of law it is referred to as a **civil obligation**.
A natural obligation is unenforceable.

Theories of contract

The **will theory,** the basis of contract is to be found in the individual will. Parties are bound by their contract because they have chosen to be bound (subjective).
An objective approach to contract (**declaration theory**) is the polar opposite of the will theory. The inner wills of the parties are irrelevant; what is important for contract is not what the parties think but what they say or do: the external manifestations of their wills.
A compromise theory is the **reliance theory.** The basis of contract is to be found in detrimental reliance on the appearance of the agreement; in the reasonable belief in the existence of consensus, induced by the conduct of the other party.

Approach to contract: subjective or objective?

Smith v Hughes (1871) LR 6 QB 597.
Pieters & Co v Salomon1911 AD121.
South African Railways & Harbours v National Bank of South Africa Ltd 1924 AD 704.
Saambou-Nasionale Bouvereniging v Friedman1979 (3) SA 978 (A).
Steyn v LSAMotors Ltd 1994 (1) SA 49 (A).

The Roman-Dutch writers adopted a subjective approach (*animus contrahendi* and *concursus animorum,* or meeting of the minds).
English law has always preferred a more objective approach. *Smith v* Hughes 'if the parties are not ad idem, there is no contract.
If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that the other party upon belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.'

Pieters & Co v Salomon the English approach.
When a man makes an offer in plain and unambiguous language, which is understood in its ordinary sense by the person to whom it is addressed, and accepted by him bona fide in that sense, then there is a concluded contract. Any unexpressed reservations hidden in the mind of the promissor are in such circumstances irrelevant. He cannot be heard to say that he meant his promise to be subject to a condition, which he omitted to mention, and of which the other party was unaware.
Our law does permit escape from a contract on the grounds of justifiable mistake; it does entertain claims for rectification of contractual documents that incorrectly reflect the parties' common intention. It recognizes the importance of *animus contrahendi* in a variety of contexts.

Saambou-Nasionale Bouvereniging v Friedman. 'the true basis of contractual liability in our law… is not the objective approach of the English law, but is the real consensus of the parties.'

The decision in *Steyn v LSA Motors Ltd* illustrates that this is now the accepted approach of our law.
Steyn, an amateur golfer, participated in a golf tournament that was open to both amateurs and professionals. Next to the 17th hole, there was on display a new car and alongside it a board proclaiming: 'Hole-in-one prize sponsored by LSA Motors'. Steyn duly scored a hole-in-one, but the sponsor refused to give him the car on the grounds that the prize had only been intended for professional golfers. In the litigation that followed, it became plain that the garage had never intended to make any offer to an amateur such as Steyn, and that there was accordingly no consensus between the parties. Steyn tried to brush aside this fact with an argument that what was important was not the garage's intention but

rather what was stated on the advertising board. The court rejected this argument.
The court held that a reasonable person in Steyn's position would have realized that the offer was only open to professionals and accordingly that he had no contractual claim to the car.

Dual basis of contract in modern law

There are two bases on which to establish a contract in modern South African law: Consensus and Reasonable reliance. Primary basis is consensus (will theory) and the approach is essentially subjective.
If the conclusion is that the minds of the parties never truly met, the enquiry has to go one step further. One must then ask whether either party by their words or conduct led the other party into the reasonable belief that consensus had been reached. If so the contract will be upheld on the secondary basis of reasonable reliance. A contract can be founded on quasi-mutual assent. This is because our approach to contract is now wholly subjective.

Proving the existence of a contract

The onus of providing the existence of a contract rests on the person who alleges that the contract exists. The onus will be discharged by adducing evidence of either consensus or reasonable reliance on the appearance on consensus.

Cornerstones of contract

Consensus and **reliance** are fundamental concepts in the modern law of contract. Other fundamental ideas include the following:

a) **freedom of contract** – the idea that people are free to decide whether, with whom and on what terms to contract (party autonomy)
b) **sanctity of contract** – the idea that contracts freely and seriously entered into must be honoured and, if necessary, enforced by the courts;
c) **good faith** – the idea that parties to a contract should behave honestly and fairly in their dealings with one another; and

d) **privity of contract** – the idea that contract creates rights and duties only for the parties to the agreement, and not for third persons.

The goals of contract law
What are the aims of contract law?

- To ensure that people keep their promises, as a matter of honour and morality in society;
- To promote legal and commercial certainty, by providing a framework within which persons can safely transact and conduct business, secure in the knowledge that agreements seriously entered into will be enforced;
- To promote fairness and reasonableness in contractual dealings, by imposing standards that encourage 'good' commercial behavior, and that discourage chicanery and over-reaching; and / or
- To provide a workable system of rules that will encourage private enterprise and underpin the operation of the free-market economy.

Competing values in the law of contract

The law of contract is concerned not only with sanctity of contract, but also with fairness in contract dealings.

Freedom and sanctity of contract

The dominant of classical model of contract law are the following:

- *Freedom and autonomy of the parties*
- *Minimal state intervention*
- *A preference for clear and certain rules, rather than open-ended standards*
- *Self-interested individualism*
- *Assumed fairness of the exchange*
- *A discrete event*

Good faith and equity in contract:

The concept of good faith, or *bona fides,* has deep roots in our legal system.

In *Sasfin(Pty) Ltd v Beukes*
The respondent doctor had entered into an agreement with the appellant finance company in terms of which he placed the company in immediate and effective control of his present and future earnings, and rendered himself powerless to bring his situation to an end. Such an agreement said, unconscionable and incompatible with the public interest. Public policy favoured the utmost freedom of contract; a further consideration was that 'public policy should properly take into account the doing of simple justice between man and man'.
Good faith was still required of the parties to a contract, but the precise nature and scope of the requirement was the subject of much debate. Concepts such as good faith, reasonableness and fairness were merely abstract values rather than independent, substantive rules that could be employed by a judge to intervene in contractual relationships.
(Brisley)

Contrast Saayman and Shoprite Checkers cases.

Saayman: The foundation was laid by the Appellate Division's recognition that in our law the concept of good faith is applicable to all contracts, and its acceptance of the principle that in deciding whether public policy forbids the enforcement of a contract the circumstances existing at the time enforcement is sought must be taken into account. Public policy is a question of fact not law and changes with "the general sense of justice of the community, the boni mores, manifested in public opinion", public opinion being understood in the sense of seriously considered public opinion on the general sense of justice and good morals of the community. By limiting good faith in the enforcement of the contract to the requirement to show that degree of consideration to the legitimate interests of the other party that public policy demands, the Supreme Court of Appeal could tackle the unfair enforcement of contracts with a flexible instrument free from the rigidity inherent in an Act of Parliament.'

Shoprite Checkers:
This application originates from a lease dispute between Everfresh and Shoprite Checkers (Pty) Ltd (Shoprite). Shoprite bought the premises from its predecessor in title during the currency of the lease, a portion of which is the subject of the lease between the parties. Clause 3 gave

Everfresh an option to renew the lease on its expiry on the same terms and conditions, subject to agreement being reached between the parties on the rental.

Seeing that Shoprite was opposed to the renewal of the lease on its expiry, Everfresh remained in occupation of the premises. It alleged that it had unilaterally but validly renewed the lease in terms of clause 3. Everfresh alternatively alleged that Shoprite had no right to evict it, because clause 3 obliged Shoprite to make efforts in good faith to reach an agreement on rental. Subsequently, Shoprite sought and obtained an eviction order against Everfresh in the Kwa-Zulu Natal High Court, Pietermaritzburg (High Court). The High Court held that an option to renew a lease on terms to be agreed is unenforceable. The Supreme Court of Appeal (SCA) agreed with the High Court and dismissed Everfresh's application for leave to appeal.

Before the Constitutional Court Everfresh argued that the common law of contract must be infused with constitutional values, to provide for greater recognition of the concept of good faith. The question was whether this can be done in circumstances where this issue was directly raised in neither the High Court nor the SCA, but for the first time before the Court.

Majority judgment: acknowledged the importance of mixing of constitutional values into contract law. However, it was concluded that it was not in the interests of justice to entertain the appeal and that Everfresh had not advanced any grounds why it would be in the interests of justice for the Court to decide the appeal as the court of first instance. Held that Shoprite was not warned of the case it had to meet and the relief sought against it, nor was the Court afforded the benefit of the views of the High Court and the SCA which would help shape the common law and customary law in line with the normative grid of the Constitution.

Thus the Constitutional Court dismissed the application for leave to appeal with costs. The Court refused to set aside the order of eviction and to remit the matter back to the High Court for re-hearing.

(Minority judgment held: the mixing of the values of the Bill of Rights into contract law is of a sizeable significance, and that the High Court was obliged to develop the common law in the light of the factual dispute before it, and that it is appropriate to refer the matter back to the High Court to consider whether to develop the common law).

The Consumer Protection Act 68 of 2008:

The Act aims to establish a legal framework for the achievement of a consumer market that is fair, accessible, efficient, sustainable and responsible, for the benefit of consumers generally; to promote fair business practices; and to protect consumers from unconscionable, unjust or unreasonable business practices.
The Act recognizes a number of fundamental consumer rights, including:

- The right to equal treatment in the marketplace (which affords protection against discriminatory marketing, for example);
- The right to privacy (which affords protection against direct marketing practices);
- The right to choose (which covers a host of ancillary rights, such as the right to select suppliers, to choose or examine goods and to return them, to a cooling-off period in certain circumstances, and to cancel advance bookings, reservations or orders);
- The right to disclosure and information (disclosure, for example, of the price of goods and services, and that goods are reconditioned, or are gray market goods, with no misleading labelling or trade descriptions, and with all information in plan and understandable language);
- The right to fair and honest dealing (which affords protection against unconscionable conduct such as fraud, duress, undue influence, misleading representation, pyramid schemes and over-selling or over-booking);
- The right to fair, just and reasonable terms and conditions (which will be considered in more detail below); and
- The right to fair value, good quality and safety (which extends the common-law protection of consumers significantly by introducing a strict no-fault regime of liability or harm caused by defective products).

These rights are to be protected and enforced not only through the courts, but also through national consumer protection institutions.
The scope of the Act is to apply to most transactions concluded in the ordinary course of business between suppliers and consumers within South Africa, as well as to the promotion of goods and services that could lead to such transactions, and to the goods and services themselves once the transaction has been concluded.
The Act will not have retrospective effect. It will not apply to agreements or transactions concluded before October 2010.

Provisions of the Act dealing with the consumer's right to fair, just and reasonable terms and conditions. These include:

- Terms aimed at defeating the purposes and policy of the Act, or misleading the consumer, or subjecting the consumer to fraudulent conduct.
- Terms that purport to waive or deprive a consumer of rights under the Act, or to avoid supplier's obligations under the Act;
- A term that purports to limit or exclude the liability of a supplier (or those for whom he or she is responsible) for harm caused by gross negligence; and
- A term that falsely expresses an acknowledgement by the consumer that no warranties or misrepresentations were made in connection with the agreement.

A term is unfair, unreasonable or unjust if:

- It is excessively one-sided in favour of the supplier; or
- It is so adverse to the consumer as to be inequitable; or
- It was introduced by a supplier's false, misleading or deceptive misrepresentation; or
- The existence, nature and effect of the term was not adequately drawn to the attention of the consumer in a clear and conspicuous manner before the transaction was entered into.

One consequence of these provisions is that liability for ordinary (but not gross) negligence may still be excluded by means of an appropriately worded exemption clause, provided the exclusion is fair and reasonable and that it is adequately drawn to the attention of the consumer before or at the time of entry into the transaction.

<u>The impact of the Constitution:</u>

A question, which arises, is whether the Constitution applies directly (ie whether the constitutionality of a contractual term can be tested directly against a provision of the Constitution) or indirectly to contractual relations (ie whether a contractual term offends public policy as informed by the fundamental values enshrined in the Constitution). *Barkhuizen v Napier,* a majority in the Constitutional Court expressed grave doubts about the appropriateness of testing the constitutionality of a contractual term directly against a provision in the Bill of Rights.
The majority preferred an indirect application of the Constitution to the contractual dispute before them. The proper approach to constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy; and what constitutes public

policy must be discerned with reference to the fundamental values embodied in the Constitution, and in particular in the Bill of Rights. Another way in which the Constitution may affect a contract is by rendering invalid the **exercise of a contractual power** by a contracting party.

Constitutional values may impact on a contract by rendering some of its provisions, or the entire contract, contrary to public policy (for being in conflict with the Constitution), and thus invalid or unenforceable.
But the Constitution may also impact on contractual relations in other ways, eg by possibly rendering invalid the exercise of a contractual power, such as the right to cancel a contract (Bredenkamp). It may be possible for a party to be compelled to contract with another where refusal to enter into the contract amounted to unfair discrimination (Hoffmann v South African Airways). The full impact of the Constitution on the law of contract has not been settled.

In *Bredenkamp v Standard Bank of South Africa*, the court granted an interim interdict restraining a bank from cancelling its client's bank accounts, even though the bank had a contractual right to do so. This decision suggests that an unfair or unreasonable exercise of a contractual power will not be allowed. However, the interim interdict was set aside in the application for final relief, and, on appeal, the Supreme Court of Appeal found that the termination did not offend any identifiable constitutional value and was not otherwise contrary to public policy. This court also held that fairness is not a separate requirement for the exercise of a contractual right. It remains to be seen what the Constitutional Court might make of this type of situation in future. It may also be possible for a party to be compelled to contract with another where refusal to enter into the contract amounted to unfair discrimination.
Thus, the full impact of the Constitution on the law of contract has not been settled.

The supremacy clause (s 2), provides: “The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled. All law, including the common law of contract, is subject to constitutional control. The validity of all law thus depends on its consistency with the provisions of the Constitution and the values that underlie it.
S 39(2) makes provision for indirect horizontal application of the Bill of Rights: ‘When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights’.

Consensus

Consensus or ostensible consensus is one of the requirements for the conclusion of a valid contract.

(1) The basis of a contract

There are at present 2 reasons why the law will attach contractual liability to a contract.
These 2 reasons are the following:

(1) Actual agreement of the intention of the contracting parties. Agreement is generally accepted as the primary basis of contractual liability.

(2) Where actual agreement does not exist but one of the parties has a reasonable reliance that it does exist.
In such a case there is ostensible agreement.

The will theory – the notion that contract are based on consensus has given rise to a theory called the will theory.
Since this theory requires actual or conscious consensus between contractants a contract will not arise where consensus has been excluded by a material mistake.

The reliance theory – consensus is the primary basis of contractual liability because in most contracts the contracting parties do actually correctly express their intentions.
In a minority of contracts one of the parties fails to express his intention correctly.
Here, the problem is solved by holding the erring party bound to his expressed intention because of the fact that he has created a **reasonable reliance** in the mind of the other party that they have reached consensus.
This is the secondary basis of contractual liability.

(2) The elements of consensus

The elements of consensus are the following:

(1) unanimity between the parties as to the consequences they wish to create – COMMON INTENTION
(2) unanimity between the parties as to the fact that they wish to create juristic consequences- SERIOUS INTENTION
(3) awareness among the parties of their unanimity – AWARE OF EACH OTHERS INTENTION.

Thus where both parties are not agreed that they want to create juristic consequences, that is, where there is no mutual intention to be bound; there is actually no question of juristic consensus.
Consensus is absent, therefore in the following instances:

- Where neither of the parties has the intention to be bound, although they create the impression outwardly that they do have such an intention.
  The law judges such a simulated juristic act i.t.o. the true intention of the parties.
  The faked or simulated agreement will be void (Vasco Dry Cleaners).
  The rule is **plus valet quod agitur**, which means that with simulated acts the true intention of the parties will be given effect.
- Where only one of the parties did not have the intention to be bound, for example where A makes an offer as a joke, or makes an offer at an auction, without the intention to buy, solely in order to push up the price.
  In such a case, despite the dissensus, he may be held liable by virtue of the reliance theory.

THUS INTENTION THE BASIS OF CONTRACTUAL LIABILITY = PRIMARY THEORY!

THE OFFER:

Prescribed cases

- *Crawley v Rex*
- *Bloom v American Swiss Watch Co*
- *Bird v Sumerville*

An offer is a declaration of intention by one party (the offeror) to another (the offeree), indicating the performance that he or she is prepared to make, and the terms which he or she will make. An offer is usually addressed to a specific person, but may also be addressed to a group of people, or the general public.

This usually occurs when the offeror is informed that the addressee (offeree) has accepted the offer.

A simple example would be where X (offeror) says to Y (addressee) that he offers to purchase Y's cow for R10 000.

On the other hand Y (offeror) could also have been the one who made the offer by asking X (addressee) if he would be interested in purchasing his (Y's) cow for R10 000.

Requirements for a valid offer

- ***The offer must be definite and complete***

- The offer must embody or contain sufficient information to enable the person to whom it is addressed to form a clear idea of exactly what the offeror has in mind.

- The offer must be so certain that it is enough for the addressee merely to answer 'yes' for a contract to be constituted.

- Furthermore it must be stressed that the offer must be clear and certain.

- ***The offer must contemplate acceptance and a resultant obligation***

- It is not enough for the one party to make a tentative statement to the other merely to sound him out, that is, to find out whether he would be prepared to enter into negotiations.
- Thus, the offer must be a firm offer.
- An important question arises in this connection with regard to the legal effect of advertisements.
  For instance, a shop-keeper places an advertisement in the window of his shop: 'Jimmy Choo shoes obtainable here at R1500 per pair'.
- This statement does not constitute an offer since the advertiser clearly could not have contemplated that mere acceptance of his statement would create a legal bond between himself and the acceptor. (Crawley v Rex)
- However, a promise of reward is a form of advertisement that does constitute an offer. (Bloom v American Swiss Watch Co)

- ***The offer must come to the attention of the offeree (addressee)***

- This requirement is a natural consequence of the fact that, as has been stated, an agreement is a conscious or stated mutuality of consent.
- The offeree must therefore have knowledge of the offer to be able to react to it. (Bloom case)

- ***An offer must as a rule be directed at a definite person (offeres) or persons (offerees), although it may also be directed at undefined persons.***

1. an offer directed at an defined person or persons

- Where an offer is addressed to unascertained persons, it may be accepted by anyone of them, but where it is addressed to a specific person or persons, it may be accepted by only the addressee(s).

2. an offer directed at undefined persons

- A promise of reward, and auctions, are forms of this type of offer.
- Here we must distinguish between a simple auction and an auction subject to conditions.

Auctions:

- In the case of a **simple auction** the most acceptable construction is that the bidder makes an offer, which the auctioneer then considers and either accepts or rejects.
- If the auctioneer implies, by the consideration of a new bid, that he does not accept the previous bid, it simply falls away.
- The mere making of a higher bid does not, however, mean the displacement of a previous bid per se.
  It is up to the auctioneer to accept or reject it.
- In this instance it is clear that the offer is made to a definite person, the auctioneer.

An **auction subject to conditions** is different.

- The conditions may relate to many things: to the manner and time of payment, to the passing of ownership, to the auctioneer's remuneration, etc.
- However, the conditions may also concern the holding of the auction itself: for example, that the auction will take place with or without reserve.
- These conditions may be advertised beforehand, in a newspaper or may be posted up or announced at the auction itself.
  They are not binding per se.
- If the auctioneer advertises that he is going to hold an auction on the day after tomorrow subject to certain conditions, and then changes his mind, he may not be held liable to anyone.
- He becomes liable only when a ground for liability arises.
- In considering this question it must always be borne in mind that one is dealing with 2 potential contracts.

NB Firstly, the contract which binds the parties to auction conditions, and

Secondly, the substantive contract of sale.

- When an auctioneer announces that an auction is to be held under the following conditions: firstly, payment in cash on delivery and, secondly, that the auction will be held without reserve, he is announcing that this is the basis on which the auction will be held.
- In doing so he makes an offer.
- He is free to revoke this offer, like any other offer, before it has been accepted.
- It is this offer which is made to undefined persons.
- The auctioneer does not address his offer to any specific bidder and thus any bidder may react to it.
- Any person who bids for an article offered for sale, thereby makes it known that he agrees to the conditions laid down by the auctioneer, and a contract to that effect therefore arises.
- The auctioneer's offer in regard to the auction conditions has therefore been accepted and is now binding on both parties.
- The auctioneer is now bound to accept the highest **bona fide** bidder as the buyer and the buyer is obliged to pay cash on delivery.
- Once he has accepted the highest bona fide bid a contract of sale arises.
- Any person who makes an offer without acquainting himself with the conditions is actually labouring under mistake about contract, but because of his unreasonable conduct, he cannot rely on the absence of consensus.

<u>The lapse of an offer</u>

An offer lapses in the following circumstances:

- after the expiry or lapse of the prescribed time, or of a reasonable time
- upon the death of either the offerer or the offeree
- upon being rejected
- Upon revocation.

<u>The consumer protection act:</u>

a) *The offer must be in plain and understandable language.* The producer of a notice, document or visual representation in the prescribed form if any, or in plain language if no form has been prescribed.

b) *The offer must disclose whether goods are reconditioned or gray market goods.* A person who offers to supply any goods that have been reconditioned, rebuilt or remade and bear the trademark of the original or supplier must indicate conspicuously that the goods have been reconditioned, rebuilt or remade.

- ***Negative option marketing*** *is prohibited.* A supplier may not promote any goods or services on the basis that the goods or services are to be supplied unless the consumer declines the offer.
- *Consumers have the right to a* ***cooling off period*** *if goods were marketed to them directly.*
  A person who markets goods or services directly to a consumer at a place other than their usual place of business must inform the customer that, he or she is entitled to rescind any contract concluded by notice to the supplier in writing, or another recorded manner, within 5 days of, the later of, either the date on which the agreement was concluded, or the date in which the goods were delivered to the consumer.
- ***Catalogue marketing*** *is regulated.* If a consumer initiates and enters into an agreement for the supply of goods and services, not in person, but telephonically, by postal order or by fax, and the consumer does not have the opportunity to inspect the goods prior to the conclusion of the contract, the supplier must disclose the following information to a consumer: the supplier's name, licence or registration number, the supplier's physical address, sales record information required in terms of s 26; the currency in which the price must be paid; the supplier's delivery arrangements; the supplier's cancellation, return, exchange and refund policies; and the manner and form in which a complaint may be lodged.

Who makes the offer in supermarkets?

The shopkeeper makes an invitation to do business and the customer makes the offer to purchase (*Crawley).*

THE ACCEPTANCE

An **acceptance** is a clear and unambiguous declaration of intention by the offeree, unequivocally assenting to all the terms of the proposal embodied in the offer.

Requirements for a valid acceptance

- **the acceptance must be unconditional and unequivocal**

When the acceptance contains conditions or reservations, it is no acceptance but is in fact a counter-offer which the original offeror may accept or reject in turn.

- **the offer must be accepted by the person to whom it is addressed**

The offer cannot be accepted by anyone but the person to whom it is made.

- **the acceptance must be a reaction to the offer – a person cannot accept an offer of which he is not aware**

Bloom v American Swiss Watch case:
In casu, the company offered a reward to any person who could provide information which would lead to the arrest of thieves who had stolen jewellery from the company.
B furnished information while ignorant of the reward offered.
When the advertisement of the reward came to his notice, he tried to claim the promised sum from the company.
Court held that he could not claim the reward because 'until the plaintiff knew of the offer he could not accept it, and until he accepted it there could be no contract'.
Thus, if the one did not know what the other was proposing, the 2 minds never came together.

- **the acceptance must comply with any formalities set by law or by the offeror**

The acceptance must comply with formalities for a valid contract to arise.

Moment of formation of the contract: the problem of contracts concluded by post.

The information theory:

- This theory rests on the principle that the primary basis for contractual liability is actual and conscious agreement between the contractants.
- The offeror must have been informed of the acceptance of his offer before actual consensus has been reached and a contract arises.
- Thus there can be no consensus unless the offeror knows that his offer has been accepted.
- The general rule, therefore, is that an agreement is formed only when the acceptance is communicated to the offeror.

Exceptions to the information theory

- where the offeror expressly indicates otherwise

The offeror may expressly abandon or waive his right to notification.

- where the offeror tacitly indicates otherwise
- contracts concluded by way of letter or telegram

A writes a letter to B in which he makes him a certain offer and mails it to B.
B accepts the offer, likewise by way of a mailed letter.
Since there is an interval between the expression of B's acceptance and its communication to A, the problem is determining if and when the contract is concluded.

- The problem is to determine if and when the contract is concluded where contracts are concluded by post.
- There are 4 theories i.t.o. which this problem may be solved:

(1) The **declaration** theory – i.t.o. which the agreement is concluded once B (offeree) has expressed his acceptance, that is when he has written the letter.
(2) The **expedition** theory – i.t.o. which the agreement is concluded as soon as B has posted his letter of acceptance.
(3) The **reception** theory – which hold that the agreement comes into being when A (offeror) receives B's letter of acceptance.
(4) The **information** theory – the agreement is concluded only when the offeror has been informed of the acceptance, in other words, when A has read B's letter.

Application of the **expedition** theory:

Although the information theory was accepted in previous decisions, it was decided in Cape Explosives Works v SA Oil and Fat industries that agreements entered into by letter arise at the place and at the moment when the letter of acceptance is mailed.
The expedition theory was introduced into our law by this judgment.
The expedition theory has been met with a certain amount of criticism.
The application of this theory in these circumstances is explained on the basis that the offeror who uses the post to convey his offer thereby tacitly prescribes the post as the mode of acceptance.
However, it is important to note that the expedition theory will only apply if the offeror has sent his offer by way of post.

Criticism of the expedition theory
The decision in the *Cape explosive works* case has met with criticism.

1) Although it is true that the offereor may waive the requirement of notification of acceptance, it is a fallacy to assume that he or she does so merely by using the postal system to communicate the offer. The posting of the offer might indicate that a reply by post is anticipated (not authorized; the offeree does not require special permission to respond by post), but in itself is insufficient to ground an interference of waiver.
2) The justification of commercial convenience is unconvincing.
3) Adoption of the expedition theory implies that a posted acceptance may not be revoked or neutralized by a faster means of communication, such as telegram or fax.

Electronic Communications and Transactions Act 25 of 2002, which provides that contracts concluded by e-mail and other means of electronic communication are concluded at the time when and place where acceptance of the offer is received by the offeror (the reception theory).

Breaking off negotiations
Parties involved in negotiating a contract are generally free to terminate their negotiations wherever they so wish. Negotiations may create the expectation that a contract will eventually come into being. This may have legal consequences. The right to break off negotiations is restricted by normative considerations. Entering into negotiations creates a certain relationship between the parties that is governed by good faith and

objective reasonableness; each party is expected to honour the **legitimate expectations** and interests of the other. The law could impose a duty to inform or to exercise due care, or an obligation to pay compensation for loss arising out of the frustration of reasonable expectation of a duty to continue negotiating in good faith.
South African courts have recognized that the principle of good faith applies to pre-contractual negotiations, but the implications of this have still to be worked out.

Pacta de Contrahendo – options and rights of preference

(a) Option contracts

- Contracting parties may enter into an agreement i.t.o. which the offeror undertakes not to revoke his offer.
- In such case, the party grants the other an option.
- In the case of an option, we are dealing with an offer which forms the subject matter of an agreement not to revoke the substantive offer.
- The parties agree that the offeror will not revoke the offer, either expressly or by implication, for example, by offering the same thing to a 3rd party.
- An option can be defined as an offer (**substantive** offer) reinforced by an agreement (**option** contract) i.t.o. which the offeror (grantor) undertakes as against the offeree (grantee) to keep open his offer (usually for a specific period) to the offeree.

Consequences of an option

- If B accepts the offer by exercising the option, a contract of sale is created immediately.
- Nothing more is required of the offeror for the formation of the contract of sale.
- Breach of an option contract and the consequences thereof are governed by the general principles of the law of contract.

Juristic nature of an option

- Option: an election to accept or not to accept the substantive offer.
- Offer to sell and the offer to uphold the substantive offer may or may not occur simultaneously.

Termination of options

- passage of time
- death of the grantor (offeror) or grantee (offeree)
- refusal
- lapse of the right

Formalities concerning options

- 2 contracts come into play in the case of an option.
- The option contract and the substantive contract created when the option is exercised.
- Both must comply with the usual requirements for the formation of contracts.
- Thus the substantive agreement must comply with certain formalities.
- Therefore, the question arises whether the option contract must also comply with certain formalities.
- Must an option to alienate land must also be in writing and signed.

S2 of **The Alienation of Land Act** provides the following:

'no alienation of land after the commencement of this section shall, subject to the provisions of **S28**, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents…'

In Brandt v Spies the defendant orally granted an option to the plaintiff to purchase the farm.
Disregarding the option, he sold it to a 3rd party.
Plaintiff, who had exercised the option in writing, then claimed damages for breach of contract, but an exception to his claim was upheld.
The court stated the following:

'If the offer is not in writing there is nothing which the offeree can accept so as to create a vacuum between himself and the offeror.'

This judgment, it is submitted, is correct in the case where the offer to sell and the offer to keep the first offer open are made simultaneously and orally.
As regards the contract of sale, **both offer and acceptance** must be in writing in accordance with the above-mentioned legislation, and the *offer* has been made *orally* in such a case.
In Hirschowitz v Moolman the court, however, held that as a general rule **pacta de contrahendo** must conform to any formalities prescribed for the substantive contract, including option contracts relating to the purchase of land.

This case dealt with the right of pre-emption and therefore the statement of the court must be regarded as obiter as far as options are concerned. Since the exercise of the option is nothing but an acceptance of the substantive offer to sell, it is obvious that it must **also be in writing** before a contract of sale, in writing, is created.

(b) Rights of preference

A right of preference is another type of **pactum de contrahendo** i.t.o. which one of the prospective contractants is granted a preferential right to conclude a contract with the other prospective contractant.
This occurs when a prospective seller undertakes as against a prospective purchaser to give him (the purchaser) preference if he should decide to sell.
The prospective purchaser thus acquires i.t.o. an agreement, the right to be granted the first opportunity to buy the thing should the prospective seller decide to sell.

The agreement which gives rise to the preferential right may differ from case to case. For Example:

1. This right may be coupled with the option granted by the purchaser.
   The prospective purchaser is compelled to keep open his offer to buy, for the agreed period, and the prospective seller is obliged, if he decides to sell, to exercise the option granted him in so doing to accept the offer.
2. The prospective seller may bind himself as against the prospective purchaser to offer the thing for sale to the latter at the first acceptable price or at the highest price which may be offered to him by a 3rd party.
   If the seller receives an offer from a 3rd party he may not accept it before he has given the holder of the right the opportunity to decide whether he wants to buy the thing at that price.
3. The seller may bind himself as against the prospective purchaser to offer the thing for sale to the latter on the occurrence of a future event for example, when it is decided no longer to use the land as a race track.

A contract i.t.o. which a right of preference (pre-emption) is granted must comply with all the requirements for contracts in general.

Legal nature and consequences of a right of pre-emption

The contract of pre-emption does not place a duty on the grantor to sell the subject matter of the right; the grantee merely acquires the

preferential right to buy should the grantor decide to sell. The prospective seller's capacity to alienate the thing in question is thus restricted.
The prospective purchaser therefore also acquires a right, but, whereas the performance to which the grantor of an option is bound is the maintenance of an offer, the obligation in the case of the right of pre-emption is a negative one, that is, that the thing may not be alienated to a third party except under the conditions prescribed in the agreement creating that right (*Owsianick v African Consolidated Theatres*).
A certain amount of uncertainty regarding the precise construction of the contract of preference has also resulted in some uncertainty regarding the position of the holder of the right, upon breach of contract by the grantor. In *Owsianick v African Consolidated Theatres*, the Appellate Division held that a right of pre-emption entails a restriction on alienation and that the holder was entitled to an interdict to prevent the grantor from alienating the thing to a third party. Also, it held that the only other remedy available to the holder was a claim for damages. The court decided that the holder of the right could not enforce his right positively; in other words, he could not claim to actually purchase and claim delivery of the thing (ie a claim for specific performance).
In certain subsequent decisions, it has been assumed that a right of pre-emption may be enforced positively.
In Associated SA Bakeries, the court also doubted whether the holder could claim specific performance by means of an order directing the grantor to make him an offer, but adopted another approach which was set out as follows: if a seller concludes a contract of sale with a third party contrary to a pre-emptive right, the purchaser can step into the shoes of the third party by a unilateral declaration of intent. A contract of sale will then be deemed to have been concluded between the seller and the holder of the pre-emptive right. Should delivery already have taken place, the holder of the right would not be able to pursue the merx in the hands of the third party with his or her personal right, unless the latter was aware of the existence of the pre-emptive right.

Formalities concerning rights of pre-emption (preference)

- If the object of the envisaged sale is land, both the offer to buy (or sell) and the acceptance thereof must be in writing.
- The contract from which the right of pre-emption arises also has to be in writing. (Hirschowitz v Moolman)

Error (mistake) – NBNB!!!!

Classification of mistake:

Unilateral, mutual and common mistake

Unilateral mistake – one party is mistaken, while the other party is aware of his or her mistake.
Mutual mistake – both parties are mistaken about each other's intention and are at cross-purposes. (neither is aware of the other's mistake)
A **common mistake** is shared by the parties and differs fundamentally from unilateral or mutual mistake, because it does not lead to dissensus. It results in a contract being void.

Irrelevant and relevant mistake

Sometimes a mistake does not negate consensus (and is therefore an **irrelevant mistake**) if it did not affect the mistaken party's decision to enter into a contract. If the mistaken party would have entered into the contract, despite a mistake that causes dissensus.
In *Khan v Naidoo,* the appellant signed an agreement as surety for the debt of her son while under the impression that she was consenting to something completely different. The appellant's mistake would normally indicate an absence of consent on her part, the court held that she was bound to the suretyship because she would have signed the document even if she had been aware of its true nature.

A principal must bear the brunt of the misrepresentation of his agent who causes an operative mistake on the part of a third party; this results in the undoing of the agreement on the basis of a iustus error (eg *Allen v Sixteen Stirling Investments; Maresky v Morkel; Goldberg v Carstens; Kok v Osborne*.) In such circumstances the misrepresentation of the agent activates successful invocation of reliance in its indirect or negative form; that is that no contract exists because of material and reasonable error on the part of the third party. One could also argue that where an agent misrepresents (in as many words or by other conduct) to a third party that he has the necessary authority to conclude an agreement of specific content on behalf of his principal, whereas in fact he has exceeded his actual authority, it could prompt an application of reliance in its direct or positive form; that is that despite dissensus a contract exists based on the reasonable reliance in consensus of the third party (*Van Ryn Wine &*

Spirit). However, a prerequisite for rendering the principal accountable in either instance is that the agent must at least have acted within the general scope of his authority, although he has exceeded the private instructions of the principal unbeknown to the third party.

Material and non-material mistake

Actual agreement is the primary basis of contractual liability, (will theory) the question is whether the parties in fact reached *consensus ad idem*. On the basis of the will theory, if consensus is reached, and provided the other requirements for a valid contract are met, a legally binding contract arises. If the parties are not in agreement then no contract will exist on the basis of the will theory.

The distinction between a **material** (**operative** or **essential**) **mistake** and a **non-material mistake:** A material mistake is an error that negates actual consensus between the parties. A material mistake must relate to or exclude an element of consensus. A non-material mistake does not exclude actual agreement between the parties, it does not relate to an element of consensus. A non-material mistake , a valid contract will still arise, voidable (rescindable) if consensus has been obtained in an improper manner by way of misrepresentation.

If the mistake is material, the secondary principles of reliance have to be applied to determine whether a contract based on reliance has arisen.

If the mistake is non-material, a consensual contract exists and there is no need to apply the principles of reliance.

Actual agreement between the parties is the primary basis of a contract. This approach is known as the intention theory.

It places the emphasis on the intention of the contracting parties. Consensus is therefore considered to be the **primary basis** for contractual liability – **INTENTION.**

However, the intention theory cant be used in every situation, and then contractual liability has a secondary basis.

This basis is the reasonable reliance of one contractual party that agreement between the parties exists.

Mistake in contract does not simply mean that a contracting party was under a wrong impression regarding one or more fact connected with the contract; what it means is that one or even both the contractants act under some or other incorrect impression which affect the contract between them.

Thus there are 2 possibilities:

1. either the mistake is not material because it only influences the decision to contract, or
2. it is material because it excludes consensus.

Material mistake:

Remember that the parties must:

- Seriously intend to contract
- Be of one mind as to the material aspects of the contract
- Be conscious of the fact that their minds have met.

Serious intention to contract:
If a contracting party lacks the intention to be legally bound by an agreement, there can be no consensus.
In *Mondorp,* the appellant's representative signed a document that the respondent alleged amounted to an undertaking to pay certain moneys to the respondent. The appellant denied that the document contained such an undertaking and contested its liability. The majority of the court found that no contract between the parties had come into existence.
The appellant's representative did not intent to give an undertaking in terms of which the appellant would become the debtor of the respondent. The representative did not sign the document with the intention of incurring contractual liability for the appellant.

Non-material mistake

- Error in motive
- Error in substantia
  Both render the contract VALID.
  EG: error in substantia – a jeweler places two pendants (one diamond and the other crystal) in his shop window. Y buys the crystal pendant thinking it's a diamond pendant – contract valid – error in substantia = error regarding the QUALITY of the thing bought. Y wanted to buy the pendant, jeweler wanted to sell the pendant, Y should have asked re the quality.

Non-material mistakes, do not affect an element of consensus.
Eg: *Diedericks v Minister of Lands,* the defendant extended an offer to the plaintiff to purchase property from the latter. However, the defendant could merely have invoked a clause in an existing lease contract in terms of which the defendant would have repossessed the property at a much cheaper rate. The plaintiff accepted the offer, but subsequently the

defendant refused to honour its undertaking, alleging that the offer was made as a result of a clerical error. The plaintiff asked the court to declare the contract valid. The court found that the defendant's mistake related to its motive for making the offer, and did not exclude mutual assent (consensus) between the parties. Consequently, a valid contract existed.
If the mistake in motive was induced by misrepresentation of the other party, the mistaken party may have a remedy, provided the requirements for the particular form of misrepresentation have been compiled with.

Traditional classification of material and non-material mistake

Mistake of law and mistake of fact
Whether a mistake is one of fact or law, the key question is whether the mistake only affected the motive for entering into the contract.
One is to determine whether the mistake in question (whether of law or fact) merely relates to motive. If so, it is not a material or operative mistake. If the mistake did not play a role purely in the motive for the contract, then the question arises as to whether the mistake affected consensus. If it did, the mistake is material.
Unwavering application of the will theory would have extremely unfair results in certain circumstances.
Eg: Potato Board.
Consequently, in South African law, as in other legal systems that favour a subjective approach to the contract.

Reliance-based correctives
The courts have alternated between subjective and objective bases of contract. The subjective approach has been qualified by the doctrine of estoppel and the direct reliance theory. The declaration theory is an objective approach and has been corrected by the *iustus error* doctrine (indirect application of the reliance theory).
The point of intersection between the subjective and objective approaches is reliance. Reliance is a secondary theory of liability.

Subjective approach (qualified by estoppels and quasi-mutual assent):

The doctrine of estoppels

Where one party (the estoppels raiser) has a reasonable belief in a misrepresentation made by the other party (the estoppels denier) and relies thereon to his or her own detriment, the estoppels raiser may hold the estoppels denier to the misrepresentation.

A successful plea of estoppels has the effect that the misrepresented facts are upheld as if they were correct.

Van Ryn Wine, the appellant's agent sold liquor and falsely assured one of the partners in the respondent firm that she paid him cash, the respondent would receive the merchandise at a reduced price. The respondent would still be invoiced for the full price, but would be entitled to ignore invoices because they were sent out to satisfy other members of a liquor 'ring' that had fixed a standard price. The appellant did not receive the money paid to its agent and was unaware of the representations made to the partner in this regard. The appellant claimed the invoice price from the respondent. Since it was unable to prove actual agreement between the parties, the appellant invoked the doctrine of quasi-mutual assent and alleged that it was reasonable in believing that the respondent had assented to the prices in the invoices by failing to challenge them. The court held that the principle involved was one of estoppel, but found for the respondent on the basis that the partner had not been unreasonable in believing the appellant's agent; nor would a reasonable man have inferred that she was assenting to the terms of the invoices in the circumstances.

The doctrine of quasi-mutual assent or (direct) reliance theory

(**Direct**) **reliance theory** is a basis for an actual rather than a fictitious contract. The doctrine argues that for contractual liability to arise in the absence of consensus requires a reasonable belief on the part on one party (the contract assertor) induced by the other party (the contract denier) that the latter had agreed to the contract in question.

Pieters & Co v Salomon, where the plaintiffs offered to pay the amount owing by one Berger to the defendant in the belief that it amounted to £345, when in fact it was £490. The defendant accepted the offer, but was unaware of the plaintiffs' mistake. The trial court found that the defendant was entitled to payment of the full amount. On appeal, the plaintiffs contended that they never intended to make themselves responsible for more than £345. The Appellate Division upheld the defendant's claim for the full amount.

Hodgson Bros v South African Railways, wherein the plaintiffs offered, in writing, to sell a certain lorry to the defendant for £500. The defendant wrote back and indicated that it would be prepared to take over the lorry,

provided certain spare parts for it were included. The plaintiff accepted these terms. Shortly afterwards, the plaintiffs received a telegram informing them that the defendant had omitted in its letter to state the price that it was prepared to pay for the lorry, and that this price was £300. The plaintiffs adopted the stance that the defendant was bound by contract to purchase for £500, while the defendant repudiated any form of contractual liability.

The elements of the doctrine of quasi-mutual assent or reliance theory may be divided into two constituent parts. **First** requirement is that the contract denier must have *induced the reliance* or belief of the contract assertor that the parties had reached consensus, or that the contract denier had agreed to the contractual terms in question. **Second,** that the contract assertor's reliance must be *reasonable* in the circumstances.

Ridon, the plaintiff was to receive a sum of money pursuant to the sale and transfer of a wine farm. The defendant was an incorporated firm of attorneys attending to the transfer of the farm to the new owner. The plaintiff needed assurance that he would be paid the money upon transfer of the farm. The defendant's directors provided the plaintiff with a written undertaking that stated:
On behalf of Mr M Schoeni we hereby undertake to pay to yourself the amount of R358000 upon registration of the above property in the name of the purchaser.
It later transpired that the particular director was instructed by his client not to pay the amount to the plaintiff, because the possible claims that had to be set off against this amount. The plaintiff was therefore only paid a potion of the money stated in the undertaking. In an action for the balance, the plaintiff argued that in terms of the undertaking, the defendant was personally liable in contract to pay the outstanding amount to the plaintiff. The defendant's defense was that it had merely acted on the instructions of its client and that no contract had arisen between it and the plaintiff.
The party who alleges a contract on the basis of quasi-mutual assent bears the onus of proving, on a balance of probabilities.

The objective approach as qualified by the *iustus error* doctrine
The **declaration theory** or wholly **objective approach** to contractual liability grounds contractual liability purely on concurring, objective declarations. The actual intention of a party is irrelevant. The theory's

suggestion that a contract that neither party intended, may be imposed on them, merely because their declarations indicate concurring intentions from an objective viewpoint.
Prins v Absa Bank Ltd: the surety believed that he was signing a deed of suretyship of limited duration and amount whereas the bank claimed that it was for an unlimited period. Aware of the surety's misapprehension when signing the document the bank official who supervised the signing of the deed of suretyship did not correct it. It was held that it was unreasonable for the bank to rely on the unlimited suretyship.

The declaration theory in case law

South African Railways & Harbours.

The law, as a general rule, concerns itself with the external manifestations, and not the workings, of the minds of parties to a contract. *South African Railways and Harbours v National Bank of South Africa Ltd.* However, in the case of an alleged dissensus the law does have regard to other considerations: it is said that, in order to determine whether a contract has come into being, resort must be had to the reliance theory. *Saambou-Nasionale Bouvereniging v Friedman.*

The *iustus error* doctrine

Provides that a party will not be held bound to an agreement if that party apparently gave his or her consent and if his or her mistake is material and reasonable. Once the contract assertor has shown that there is an ostensible agreement, the contract denier bears the onus of providing that his or her mistake is both *material* and *reasonable* in order to be absolved from liability in terms of the apparent contract. If the contract denier succeeds, the contract is void *ab initio,* but if he or she fails, the contract denier will be contractually bound on the terms originally proved by the contract assertor. (*George v Fairmead; Potato board)*

The criteria for ascertaining the reasonableness of an operative mistake.

1. *A material mistake will usually be reasonable if caused by a misrepresentation on the part of the contract asserter. (Allen v Sixteen Stirling Investments)*

A negative misrepresentation occurs where a party has kept quiet in circumstances where in law he ought to have spoken out. Silence can constitute misrepresentation (misrepresentation by omission) when there

is a legal duty to speak in the circumstances. A legal duty to speak has been found to exist in the following instances:

- Where the contract assertor knows or ought to know as a reasonable person that the other party is mistaken, he or she must correct the contract denier's wrong impression **Eg:** *Hartog v Colin & Shields,* the defendants offered the plaintiffs 30 000 skins at prices per pound when they meant to offer to sell at prices per piece. The plaintiffs accepted the offer, well knowing that the defendants had made a mistake and that the prices offered were much lower than the prices the defendants intended to offer. When the defendants realized their mistake, they refused to perform in terms of the contract. The court refused the plaintiffs' claim for breach of contract. The plaintiffs were not entitled to 'snatch at a bargain' which they knew was not intended by the defendants.
- Where, prior to the conclusion of the agreement, the contract assertor created an impression directly conflicting with the provisions of the agreement that he or she alleges to be in contract, he or she must draw the contract denier's attention to the discrepancy. **Eg:** (*Du Toit v Atkinson's Motors Bpk)*

2. *If the contract denier is not to blame for his or her mistake,* in that he or she behaved as a reasonable person in the circumstances would have done and acted without negligence, there is some authority to the effect that the mistake is excusable.
3. *If the contract denier did not cause a reasonable belief in the contract asserter* that the contract denier had assented to the agreement, an error is *iustus* – in other words, the error is *iustus* when the contract asserter's reliance on the appearance of *consensus* is unreasonable or where there was no real reliance at all.

In the recent Supreme Court of Appeal case of *Brink v Humphries*, defence raised by the surety was one of mistake – iustus error. The surety argued that he was unaware that the credit application, which he signed incorporated a suretyship. This defence was successfully upheld by the court.

The facts of the case were briefly that Brink, a director of a co, had signed a credit application form of Humphries & Jewell (Pty) Ltd which had been completed by Brink's project manager. He disputed having read

the application form, (the document). Furthermore he contended that he did not know that the credit application incorporated a suretyship clause.
The majority decision of the court – while acknowledging the doctrine of caveat subscriptor, mentioning the judgment of *Sonap Petroleum* and ignoring *National & Overseas Distributors Corporation (Pty) Ltd v Potato Board* – proceeded to give a judgment which has effectively eroded the doctrine of caveat subscriptor. The majority court decision held that

- Brink had acted under a misapprehension that the document was solely a credit application;
- Humphries and Jewell had misrepresented the document as solely a credit application and that the misrepresentation resulted in Brink making a fundamental mistake; and
- that a reasonable businessman would not assume that a credit application would incorporate a deed of suretyship. From these conclusions the court held that the suretyship was void ab initio.

- Was there a misrepresentation as to one of the party's intentions?
- Who made that representation?
- Was the last party misled thereby? This is a two-fold test – first, was the party actually misled and, secondly, would a reasonable man have been misled?
- Having looked at the facts of the matter the judge came to the conclusion that the document was not the 'trap' or misrepresentation
- The suretyship clause was in capital letters and just above the place where Brink had signed.
- Brink's testimony indicated that he knew that banks and financial institutions required security in the form of suretyships from companies and close corporations, despite his evidence that he did not expect a suretyship in a credit application.
- The evidence of Humphries and Jewell indicated that the document had been used in their business for over 15 years and that no one had as yet been deceived by it.

Therefore the judge concluded that no misrepresentation had been made by Humphries and Jewell. On the question whether Brink had been misled by the document, the judge concluded that, based on the evidence stated above, he had not been misled.

Reconciliation of the subjective and objective approaches:

Some writers considered it prudent to throw out the *iustus error* doctrine all together in favour of the (direct) reliance theory as a corrective to the

will theory. Others considered the *iustus error* approach to be a practical and feasible way of dealing with material mistake where there is ostensible agreement. If there was to be reconciliation between the two doctrines of quasi-mutual assent and *iustus error,* the latter had to be defined in terms of the former. The *iustus error* approach would amount to an indirect application of the reliance theory. As will be seen, it is this last option that the courts have chosen.

Sonap petroleum* (SA) (Pty) *Ltd v Pappadogianis

General rule: the law concerns itself with the external manifestations and not the workings of the minds of the parties to a contract. The law has regard to other considerations. Resort must be had to the reliance theory in order to determine whether a contract has come to being.

The *Sonap* test (reliance test) thus enquires whether, in instances of dissensus, the contract denier misled the contract enforcer into a reasonable belief that the contract denier had actually assented to the contractual terms in question. If the contract enforcer realised or should, as a reasonable person, have realised that there was a real possibility of a mistake on the part of the contract denier, the contract enforcer had a duty to speak and to enquire whether the contract denier's expressed intention conformed to his or her actual intention. Failure to do so results in an absence of reasonable belief in consensus on the part of the contract enforcer and indicates a reasonable mistake on the part of the contract denier.

In *Sonap Petroleum*, the Appellate Division provided much-needed guidance as to a possible reconciliation between the subjective and objective approaches to contractual liability referred to above: first, by confirming that the iustus error approach was indeed an application of the reliance theory (more specifically, an indirect application), and, secondly, by affirming that, in cases of dissensus, the reliance theory should be applied. A complete reconciliation of the reliance theory and the iustus error doctrine occurs when the circumstances that render the contract assertor's reliance reasonable are the very same ones that render the contract denier's mistake unreasonable (and vice versa). For example, if the contract denier misleads the contract assertor into believing that he or she (the contract denier) has agreed to a contract (eg by signing a document that contains contractual terms, but without reading it), and the contract assertor does not suspect or cause the possibility of a mistake on the part of the contract denier, then a contract exists either because the contract assertor's belief is reasonable (successful application of reliance theory) or, conversely, because the contract denier's mistake is unreasonable (failure of iustus error doctrine). Although both the direct and indirect versions of reliance protection apply in our law, in recent times the reliance theory has proved more popular, and that is why the general consensus of opinion

seems to be that, today, the preferred approach to contractual liability is the will theory as supplemented by the reliance theory.

TRADITIONAL APPROACH TO ERRORS:

(1) **Error in negotio** or mistake regarding the nature of the contract.
(2) **Error in persona** or mistake regarding the identity of the other party.
(3) **Error in corpore** or mistake regarding the identity of the subject matter of the contract.

All of the above mistakes render the contract void.

(1) **Error in substantia** or mistake regarding an attribute or characteristic of the subject matter of the contract. (error regarding the quality of the thing)
(2) **Error in motive** or mistake regarding the reason or ground for entering into a contract.

These are non-material mistakes and the contract is still valid.

In Trollip v Jordaan, the agent of the seller of a farm incorrectly pointed out the boundaries of the farm to the purchaser.
The farm was smaller than represented by the agent.
3 judges of appeal came to the conclusion that the mistake regarding the boundary of a farm was not *in corpore*, while the other 2 came to the conclusion that it was. THUS CONTRACT VALID – NON MATERIAL MISTAKE. (Compare to Allen case, where the contract was VOID – material mistake)

Examples of mistake relating to the **contents** of the obligation(s) that the parties wish to create

In the Potato Board case, the respondent mistakenly accepted the tender of the appellant for the erection of a steel shed.
It intended to accept the tender of a 3rd party.
The mistake of the respondent was therefore material since it related to the persons between whom obligations were to be created.

In Steyn v LSA Motors Ltd, the respondent intended to make an offer only to the professional players taking part in the golf tournament.
The offer stated that the respondent would present a car to the golfer who had achieved a hole in one at a certain hole on the course.

The appellant, an amateur golfer, achieved the hole in one at the relevant hole and claimed the prize based on the fact that the offer had not specified that it was directed at professional players only.
The respondent's mistake related to the other party to a potential contract and was thus material.

In George v Fairmead, the appellant contended that he had signed a hotel register whereas he had, in fact, signed a contract containing a term excluding the respondent from liability for certain acts.
The appellant was not aware of this term because he did not read the document before signing it.
His mistake related to a term which he believed would not be in the contract and was material because it related to an aspect of performance.

In Allen v Sixteen Stirling Investments the mistake related to performance and was thus, once again, material.
The plaintiff believed that he was purchasing the erf shown to him by the seller's agent.
Whereas the written contract that he signed indicated that correct erf which was a completely different property.

In Du Toit v Atkinson's motor Bpk the appellant signed an agreement containing a term excluding the respondent from liability for misrepresentation.
The appellant signed the contract without reading it and thus did not know of the relevant term.
Once again the mistake related to an aspect of performance and was thus material.

Finally, regarding error as to performance, in Sonap Petroleum, the parties concluded a 20-year notarial lease contract but a subsequent addendum to the contract drafted by the appellant's attorney incorrectly indicated the period of the lease as 15 years.
Although the appellant signed the addendum, it clearly incorrectly expressed its intention as to the material term of the contract and its mistake was therefore material.

Consequences of using the intention theory in **all** instances of mistake
Leads to the conclusion that once it is certain that there is no consensus, it is also certain that there is no contract, and if no contract did, in fact, come into existence, either party should be able to rely on that fact in order to escape liability.

Thus application of this theory would mean that every material mistake would exclude contractual liability.

Thus, other **alternative** theories have been developed to explain the basis of contractual liability, such as the declaration theory and the reliance theory.

The intention theory still represents the **primary** basis for contractual liability and therefore whenever consensus is excluded by material mistake, no contract exists.

The reliance theory – NB!

- According to this theory as it is applied in SA in the context of dissensus a contract is based on the intention of one party to an agreement and the reasonable impression or reliance on his part that the other party had the same intention.
- Thus it is clear that the reliance theory is regarded as only supplementary to the will theory.

- If 2 parties do have coinciding intentions there is consensus and no need to enquire whether 1 of the parties had any particular impression of the other's intention.
- However, if there is a material mistake by one or both of them, and therefore no actual consensus, the reliance theory acknowledges a contract if one of the parties, in a reasonable manner, relied on the impression that there was consensus.
- The reliance theory finds the basis of the contract in the belief (impression) that Y created in X's mind regarding his (Y's) intention – on which belief X then relied.

Example – Y offers to sell his car to X for R80 000.
Y **intends** to sell his MX6 but by a slip of the tongue he says: 'my VR6'.
Because Y created the i**mpression** in X's mind, and this was reasonable, and that he intended to sell the VR6, there is, i.t.o. the reliance theory, a contract of sale.

Requirements

The requirements for proving a contract on the alternative basis of the reliance theory are as follows:

(1) One of the parties must have created in the mind of the other party the impression or reliance that consensus has been reached.
This means that one party must have been misled by the other into believing that consensus has been reached.

Conversely, if the one party has not actually been misled by the other no reliance has been created in his mind.
In Du Toit v Atkinson's Motors, the court found that B had not been misled by A into believing that A had agreed to the term through his signing of the contract because B had not drawn A's attention to the relevant term. Consequently the contract was void. In contrast, one of the parties in George v Fairmead was led to believe that the other party had assented to a material term in a contract because A had not signed the contract and B believed that A had read the relevant term. The contract here was valid.

(2) The party wishing to have his reliance upheld must show that his reliance or belief was reasonable in the circumstances.
If the reasonable man would not have been misled then the reliance is unreasonable and provides no basis for holding the other party liable for the impression he created.
In Steyn v LSA Motors, he contended that the board constituted an offer which extended to all players and that a valid contract came into being when he attained the hole in one.
The court found that even if the appellant had been misled by the advertising board, a reasonable man would not have been misled in the circumstances, since the rules relating to amateur golfers specified that they were only allowed a price up to R600 and the appellant was aware of these rules. Consequently, there was no contract. In Potato Board, the respondent had expressed in a letter to the appellant that the appellant's offer had been accepted. Even thought the letter had incorrectly expressed the respondent's intention, the court found that a contract existed because the appellant's belief that its offer had been accepted was reasonable in the circumstances.

(3) It is still uncertain whether fault on the part of the party whose conduct misleads the other, is a requirement.

(4) The question arises whether the misled party must prove that he acted, on the reliance, to his detriment.
They suggest that the main consideration should be whether the reliance is reasonable and not so much whether particular, separate requirements pertaining to the parties' conduct have been met. Thus according to them, detriment may play a role in determining the reasonableness of the belief or reliance.

Application of the reliance theory in case law – NB!

The reliance theory is applied in 2 ways by the courts:
(1) The **direct** reliance approach and

(2) The **iustus error** (**indirect** approach to the reliance theory).

The direct reliance theory

Before 1992 our courts very seldom used this approach.
In Sonap Petroleum it was applied.

This question, the court said, entails a threefold enquiry:

1. Was there a **misrepresentation** regarding one of the party's intention?
2. Who made that **misrepresentation**?
3. Was the other party actually misled and, if he was, would a **reasonable man** also have been misled?
   If the other party realised or should have realised as a reasonable man that the declaration of the other party's intention contained a real possibility of a mistake, there rests a duty on him t speak and enquire whether the declaration corresponds with the intention of the other party.

Where the contract **denier** (the person who does not wish to be bound by the contract) signs a written contract without reading it, he misrepresents his intention, because by signing the contract he creates the impression that the written contract represents his true intention.
The contract **enforcer** may be misled by this misrepresentation.
This is also known as the *caveat subscriptor* (let the signer take care) rule.
Where, upon conclusion of the contract, the contract enforcer creates the impression that the contract does not contain certain terms, which it in fact does and of which the other party is unaware, he is either not misled or would as a reasonable person not have been misled by the contract denier's misrepresentation

In *Sonap petroleum*, the court found that the enforcer knew that the contract denier was acting under a mistake with regard to the reduction of the term of the lease and consequently was not misled by the contents of the addendum.
The addendum was thus void.

The iustus error approach (indirect application of the reliance theory)

- This approach was usually followed by our courts before the decision in Sonap Petroleum.
- In this case it was suggested that the iustus error approach is an adaptation of the Blackburn dictum.

- This means that, since this approach is merely the reliance theory in another form, the courts are free to use the **iustus error** approach should they see fit in the circumstances of the particular case.

In accordance with this approach a party to a contract who laboured under a mistake and wishes to escape contractual liability must prove:

(1) that his mistake is **material** (if the mistake is not material there would, have been consensus)
(2) that his mistake is **reasonable**.

A mistake will generally be reasonable, if in the circumstances, it is excusable in the eyes of the law.
This will usually be the case in the following instances:

(a) Where the mistake was induced or caused by a misrepresentation made by the other party or someone for whose acts he is liable (agent).
Here the one party is misled by a statement or other positive conduct of the other party.
The misrepresentation must be legally wrongful or contra bonos mores.
A positive misrepresentation is legally wrongful per se and will render the mistake reasonable.

(b) Where the mistake was induced or caused by the failure of the other party to remove an incorrect impression (ommisio).
Here it will only be wrongful if the misrepresentor breached a duty to speak in the circumstances.
Such a duty will usually exist in the following circumstances:
    - Where the misrepresentor knew or ought reasonably to have known that the other party laboured under a mistake (Du Toit v Atkinson's Motors).
    - Where the misrepresentor, before the conclusion of the contract, crated an impression which is in direct conflict with the agreement he seeks to enforce. (Du Tiot case again).

It is also important to note that fault is not a requirement.
Generally, where the contract denier causes his own mistake and the other party is not aware of this, the mistake will be unreasonable.

The courts use both the **iustus error** and **direct reliance** approach without prescribing when a specific approach is to be used.
The courts, however, have developed each approach for application to specific situations:

(1) Where an ostensible contract has been concluded between the parties, which can easily be proved and seems prima facie to be valid, the iustus error approach would probably be more appropriate.
This approach allows a party to escape contractual liability where his mistake is both material and reasonable.

(2) Where, on the other hand, there is no prima facie agreement between the parties, one of the parties might still incur contractual liability if, on the available facts, he misled the other party, in some or other way, to reasonably believe that he (the contract denier) bound himself contractually to the other party (contract enforcer).

- A successful application of the direct reliance approach by the contract enforcer will thus lead to the conclusion that a valid contract exists on the basis of the reliance theory.
- While a successful application of the iustus error approach by the contract denier will lead to the conclusion that the ostensible contract is in fact void because of a material and reasonable error, and therefore no contract exists.

The **direct reliance** theory can be used in all situations where a material mistake has occurred:
(1) when a party wishes to void an ostensible contract;
(2) if a party wishes to enforce a contract which differs from the contract ostensibly agreed upon;
(3) where a party wishes to prove the existence of a contract where there is apparently no such contract.

The **iustus error** approach can only be used when a party wishes to avoid an ostensible contract concluded as a result of a material mistake.

So, for example, lets use the direct reliance theory on Steyn v LSA Motors:
Golfer entered a tournament, didn't read the rules, saw a sign on a certain hole saying "HOLE IN ONE – WIN A CAR FROM DELTA MOTORS", played the hole and obtained a hole-in-one – thus claiming the car.
Garage claimed he couldn't have the car, that there was an error in negotio – the DENIER was the garage and the ENFORCER was Steyn, the golfer.
The denier uses the primary theory – material mistake renders the contract void.
Enforcer uses secondary theory – reliance theory, that the denier created a reasonable reliance in his mind that he intended to contract with him

and thus the contract is valid. BUT to use the direct reliance theory, all the questions asked need to be answered as follows:
1. WAS THERE A MISPREP OF INTENTION BY ONE OF THE PARTIES TO THE CONTRACT? ***Answer must be yes.***
2. WHO MADE THE MISREP? ***Answer must be: THE DENIER.***
3. WAS THE OTHER PARTY MISLED BY THE MISREP? ***Answer must be YES.***

WOULD THE REASONABLE PERSON BE MISLED? ***Answer to be yes.***
thus, applied to Steyn's case – was there a misrep of someone's intention – YES, THE GARAGE SAID ON THE SIGN "HOLE IN ONE – WIN THE CAR. Thus creating the impression that anyone can win the car for getting a hole in one and not only certain players. Was that misrep made by the denier? YES, THE GARAGE IS THE DENIER OF THE CONTRACT. Was steyn misled? YES HE WAS, AS HE TRULY BELIEVED THAT HE'D WON THE CAR. Would the reasonable golfer have been misled? NO, HE WOULD HAVE KNOWN THE RULES OF THE GAME BEFORE ENTERING THE TOURNAMENT AND KNOWN THAT, AS AN AMATEUR, HE COULD ONLY WIN PRIZES UP TO R600, AND ONLY PROFESSIONALS COULD WIN PRIZES LIKE THE CAR!
Thus, the contract was void and LSA Motors won.

Unilateral and mutual mistake
What we have discussed so far is referred to in SA law as 'unilateral mistake'.

- English law, however, distinguishes between **unilateral** mistake and **mutual** mistake.
- The term '**unilateral** mistake' is used then to describe the case where only one of the parties is mistaken while the other knows or it must be assumed he knows of the mistake, and '**mutual** mistake' is used to describe the case where the parties misunderstand each other.

Rectification :

Where parties reduce their contracts to writing, it is possible that the written instrument unintentionally fails to reflect their common intention accurately. In these cases, the parties are in full agreement and there can be no talk of actual mistake (dissensus). Usually, the parties will rectify the document themselves or even simply perform in accordance with their common intention. If the parties cannot agree on amending the written instrument and the one party insists on a strict enforcement of the contract as written, the other party may apply to court for

rectification or correction of the written document so that is properly reflects the actual, common intention of the parties. However, what is rectified is not the contract itself as juristic act, but rather merely the document in question, because it does not reflect what the parties intended to be the content of their juristic act.
Rectification is generally regarded as a consequence of the primarily subjective approach of the South African law to contractual liability.
In *Mouton v Hanekom*, rectification was granted even though the parties had purposefully refrained from reducing the whole of their agreement to writing. There was thus no mistake as to what should have been recorded in the document.

In *Magwaza*, it was held that it is not the contract itself that is rectified as a juristic act, but the document in question, because it does not reflect what the contractants intended to be the content of their juristic act. Contract for sale of land.
Buyer alleged that the written contract contained an incorrect description of the property in that it described the property as being smaller than it was. He therefore sought an order rectifying the © so as to reflect the parties true intentions. The issue was

1. Whether in the prop was so inadequately described as to result in voidness.
2. Whether such voidness precludes a claim for rectification.

The test with the compliance with the act is whether the contract sufficiently describes the subject matter sold to enable identification of it.
In casu, the contract doesn't sufficiently describe the land as to make it capable of identification.
The contract is therefore VOID unless the parties intended the determination of the unspecified borders to be left to someone (such as the surveyor). In my opinion there is no identification that such a person was to determine the borders.
The contract is therefore a nullity.
Since the contract is a nullity there is nothing to rectify.

In general the courts require that a party claiming rectification to establish the following:

- That as a result of an error or mistake the document does not reflect the common intention of the parties.
- Furthermore, it must be established what the true intention of the parties was and how the document is to be changed to reflect that intention.

Determining the true intention of the parties is a question of fact.

Proof of a prior agreement, which in itself need not constitute a contract, is sufficient.
Where, however, writing is a constitutive requirement for the existence of a contract, the courts does not allow rectification of a document which purports to constitute such a contract but, on the face of it, does not comply with the prescribed formalities.
In such case there is no distinction between the document and the juristic act and the document thus constitutes the legal act.
Rectification may also be applied for where the disparity between the preceding agreement and the subsequent written agreement is caused not by a bona fide mutual mistake, but by the dolus of one of the parties.

Common mistake

A **common mistake** does not lead to disensus, but results in a contract being void. Common error is not a true case of mistake and the principles discussed above do not apply.
The parties are in complete agreement (*consensus ad idem*) and each knows the intention of the other and accepts it. However, both are mistaken about some underlying, fundamental fact, in that they have a mistaken assumption about a present or past fact.
Dickinson Motors

Consequences of common error

- Common error results in the contract being void.
- It therefore seems to be another form of error but this is not the case.
- A common error results in the contract being void but not for a lack of consensus.
- As stated previously, the parties are in complete agreement.

This is an **example**:
A agrees to buy from B a specific painting for R50 000.
Both A and B honestly believe it to be a genuine Pierneef, but it is later found to be a copy.
In spite of the fact that there is complete agreement between A and B, the contract is void.

Basis for common error

- There is no general agreement on the reason why a common mistake voids the contract.
- An acceptable explanation is the **implied term theory** that is, that from the common error one can infer that the parties implicitly

agreed to make the existence of their contract depend on the truth of a material fact.

- An assumption occurs where the contractants make the working of their contract dependant on the presence of some fact of the past or present.
- If the fact is, however, not present then there is no binding contract and the parties may reclaim whatever they have performed.

DICKINSON'S MOTORS:

Whether the effect of an error common to both parties results in the **contract** being void.

O's son (X) bought 2 Plymouth cars on hire-purchase
Car A was bought from D motors and car B from a 3rd party
X agreed with O to exchange car B for O's car
D motors took judgment against X for the balance owing on car A and attached car B (still in O's possession) in the mistaken belief that it was car A. O, unaware of the error, agreed to pay the outstanding amounts in return for possession of the car
Both D motors and O believed the car to be car A, while in fact it was car B. Soon after O regained possession of the car, the 3rd party removed the car after obtaining judgment for outstanding amounts owing
O sued D motors for the sum he had paid to D motors

The amount was paid under a common mistake (that the car in question was the one which D motors had sold to X), and had the parties been aware of the true state of affairs, the contract would not have been concluded.

O would not have paid his son's debt except to regain possession of the car.
D motors only agreed to release the car to O on payment of the money because it believed the car to be the one sold to X.
The money was paid under a common mistake relating to a matter which was vital to the contract.
If either party had been aware of the true position the transaction would not have gone through.
O was entitled to recover from D motors the money he had paid owing to a common error.

Here both parties have the same incorrect perception regarding a particular important aspect of their contract.
The parties are in complete agreement about what they intended
But despite their consensus the contract is nevertheless void.

Why? It can be deduced from the common error that the parties tacitly made the validity of their contract dependent on the supposition (that the car in question was in fact car A).
When the supposition proved to be incorrect, the result was that no valid contract had arisen.
Thus, contract is void.

Conflicting rights – READ BRIEFLY

The position where A
(1) sells a thing to B or
(2) grants B an option or
(3) grants B a right of preference (pre-emption) and subsequently sells the same thing to C.

In all these cases B has a personal right against A, even if B has not yet exercise the option, and even if the event required for the operation of the right of pre-emption has not yet taken place.
Now 2 questions arise:
(1) What protection does B's right enjoy before delivery of the thing to C?
(2) What protection does B's right enjoy after delivery of the thing to C?

Position before delivery to C

Before delivery both B and C have only personal rights.
There is still controversy in our law whether the adage qui prior est tempore est jure (what is first in time is first in law) applies to the situation under discussion.
The most accepted view is that it does: the prior vested right that of B enjoys preference regardless of whether or not C had knowledge thereof when he acquired his (C's) right.

B in our example is entitled to an interdict i.t.o. which A is prohibited from delivering or transferring the thing to C.
C can then institute an action for damages for breach of contract against A.

Position after delivery to C

Where C has no knowledge of the existence of the prior vested interest of B

Delivery to C renders C the owner.
C therefore has a real right, B only a personal right.
In the event of a conflict between a real and a personal rights, real rights, are preferred. B therefore has only an action for damages for breach of contract against A. He cannot claim the thing from C, the new owner.

Where C does know of B's prior vested right at the moment of delivery

Delivery albeit (in bad faith) once again makes C the owner.
However, C does have knowledge of the right and by virtue of the so-called doctrine of notice B is now entitled to apply for an order i.t.o. which the delivery to C is cancelled and the thing may be transferred to B.
B can uphold his claim against a 3rd party who has knowledge of it.

Misrepresentation NBNB!

Where a person enters into a contract on the strength of a misrepresentation made by him or her, or as a result of duress or undue influence exerted upon him or her by the other party, the agreement is none the less real for having been induced by such means. There is **no lack of consensus**, since the parties know precisely with whom and on what terms they are contracting. The agreement is accordingly a valid one. However, **obtained by improper means**, the contract is **voidable**.

Restitutio in integrum

The remedy of rescission coupled with restitution is known as ***restitutio in integrum***. It has become the remedy used to set aside a contract that is voidable on any of a number of grounds. There is no need to approach a court for an order of cancellation; an extra-judicial repudiation will suffice. Where the right to rescind is disputed, it is desirable to obtain a court order confirming the cancellation, since third parties may act on the assumption that the contract still exists.

Restitutio in integrum is available as both an **action** and as a **defence** to a suit on the contract. It is aimed at restoring both parties as far as possible to the positions they occupied prior to entering into the contract. If the innocent party elects to rescind, he or she must notify the other party of this decision, and the contract comes to an end on receipt of such notice. A duty then arises on either side to restore any performance that has been made in terms of the contract.

Delictual damages

The conduct of the party who induced the contract by improper means will frequently constitute a delict. Where this is the case, the innocent party may recover damages in respect of any financial loss that he or she has suffered as a result of the delict, irrespective of whether he or she elects to affirm or to rescind the contract. In spite of the contractual context, the **damages are delictual** (*action legis Aquiliae*).
The damages are measured according to the innocent party's negative interest; they aim to place him or her in the financial position he or she would have occupied had the delict not been committed, which in the present context usually means the position prior to contracting.

A misrepresentation can be **defined** as - a false statement of fact made by one party to the other during negotiations which induces the other party to enter into a contract he would:
1. Have never have entered into, or

2. Would have on different terms.

Thus the elements of a delict of the following:
- wrongfulness,
- fault,
- causation,
- And damages.

A **fraudulent misrepresentation** is one made
- Knowingly, or
- Without belief in its truth, or
- Recklessly, careless whether it should prove to be true or false.

It is one made without an honest belief in its truth.
A **negligent misrepresentation** is one made honestly, but carelessly. An **innocent misrepresentation** is one made without fraud or negligence.

Misrepresentation distinguished from other pre-contractual misstatements:

Warranties or contractual terms
When a statement of fact is made during the course of pre-contractual bargaining, or is embodied in a contractual document (eg: 'the car is a 1985 model'), it is often a nice question whether the statement is a mere representation, or a **warranty** – that is a **term of contract**. Test for distinguishing warranties from representations focuses on the intention of the parties: did they intend the statement to form part of their contract; in other words, that there should be a contractual liability in respect of it?
In determining the intention of the parties, the court is guided by objective criteria such as: the importance of the truth of the statement; the stage of the transaction at which it was made; and whether it was made in response to a query by the representee. Even in the absence of a genuine *animus contrahendi,* a person may be held to have given a warranty, on the basis of estoppels or the principle in *Smith v Hughes,* if he or she led the other part reasonably to believe that he or she was warranting the truth of his or her statement.
A warranty is a term, its breach gives rise to the usual remedies for breach of contract (cancellation of the contract (where the breach is material) and damages). (Positive interest)
(If misrepresentation made prior to the conclusion of the contract is subsequently incorporated into it as a contractual term, the representee may sue either for misrepresentation or for breach of contract.)

Opinions, statements as to the future and statements of law

Mere expressions of **opinion**, usually amount to misrepresentations. However, if the speaker does not in fact hold the belief or opinion which he or she expresses, or lacks the will to give effect to his or her statement of intention when he or she makes it, he or she misrepresents his or her own state of mind; and for this he or she may be held liable.

A **statement of law** has traditionally been considered to be one of opinion, rather than fact, and therefore not actionable. A statement as to the legal effect of a document is one of law; but where a party induces another to enter into a contract by representing that he or she places a particular construction upon a clause in the document, he or she will be bound by that construction, even if it is not the legally correct one.

Puffs (*simplex commendatio)*

Mere general (**puffery**) by a contracting party does not amount to misrepresentation. The party is 'merely singing the praises of his wares'. However, if the statement goes beyond loose praise and commendation, so that the exaggeration or puffing, it may well entail liability.

Dicta et promissa

It excludes puffing and is limited to the contract of sale.

A *dictum et promissum* may be either: a misrepresentation or a warranty, depending upon whether or not the seller guarantees the truth of the (false) statement; or it may perhaps be neither, as when an opinion or prediction proves to be unfounded. *Dictum et promissum* may overlap with predictions and opinions.

Misrepresentation and mistake

Misrepresentation and **mistake** are closely related. All actionable misrepresentations induce a 'mistake' in the literal sense of a misapprehension, since the representee has no grounds for complaint if he or she was not misled by false statement.

Where a mistaken belief has been induced by the misrepresentation of the other party, the contract is voidable at the instance of the representee; but the cause of action, in such a case, is misrepresentation, not mistake.

Where the mistake induced by a misrepresentation is of a material nature, the contract is void *ab initio* for lack of consensus, provided that the error is *iustus.*

Remedies for misrepresentation

A contracting party who has been misled into contracting by the misrepresentation of the other party may in appropriate circumstances set the contract aside and claim restitution, or raise the misrepresentation as a defence when sued upon the contract, and is in

addition entitled to recover damages for any losses caused by the misrepresentation.

Rescission and restitution

Where a party has entered into a contract after a misrepresentation has been made to him or her, such a party is entitled to rescission and restitution, provided that the following four criteria are met:

1. *Misrepresentation by the other party*: The misrepresentation must have been made by the other party to the contract, or by someone for whose acts he or she is responsible.
2. *Inducement*: No Relief will be granted if the representee knew that the statement was false, or if it failed to come to his or her notice. The test for inducement is a subjective one.
   Two types of fraud inducing a contract: ***dolus dans*** and ***dolus incidens.*** If, but for the fraud, the contract would not have been concluded at all, it is *dolus dans;* if there would have still been a contract, but on different terms, it is a *dolus incidens.*
   Incidental fraud (*dolus incidens*) gives a right only to damages, and not to rescission of the contract.
3. *Intention to induce:* misrepresentation should be made with the intention of inducing the other party to enter into the contract. If the unreasonable reliance by the representee was reasonably foreseeable to the represent or, rescission should be permitted.
4. *Materiality:* Materiality, the misrepresentation must be **material** in order to afford a right to rescind. The misrepresentation should be of such a nature that is would have the natural and probable effect of inducing a reasonable person to enter into the contract.
   Fault not required. The right to rescind a contract induced by misrepresentation exists irrespective of whether the statement was made fraudulently, negligently or innocently.

Misrepresentation as a defence

Misrepresentation may constitute an invalidating cause no less than a cause of action: whenever a representee may rescind a contract for misrepresentation, he or she may also use the misrepresentation as a defence to an action on the contract brought against him or her by the representor.

Damages

Whether the representee chooses to cancel or to abide by the contract, he or she may in addition be entitled to recover damages in respect of any patrimonial loss caused by the misrepresentation.

1. ***Fraudulent misrepresentation.*** *Action legis Aquiliae.*
   The five essential elements of the cause of action are as follows:
   1.1. A representation;
   1.2. Which is, to the knowledge of the representor, false;
   1.3. Which the representor intended the representee to act upon;
   1.4. Which induced the representee to act; and
   1.5. That the representee suffered damage as a result.

The motive of the representor is irrelevant; provded only that he or she made the assertion without an honest belief in its truth and intended it to be acted upon, it matters not that he or she lacked an intention to cause loss or damage to the representee; but such damage must have followed as a result of the representee acting upon the misrepresentation.

Such intention need not always be *dolus directus* – that is, the representor need not have applied his or her will to induce the representee to act upon the representation. It is sufficient if he or she subjectively forsaw such a result and was reckless as to whether the result followed or not.
The right to claim damages for fraud is not dependant on the materiality of the representation; it is no defence that the representee should not, as a reasonable person.

Since fraud is delict, the **measure of damages** is the usual delictual rather than the contractual measure. (*Trotman v Edwick*)
The victim of fraudulent misrepresentation is thus entitled to be put in the financial position he or she would have occupied had the representation not been made to him or her, but he or she cannot have the representation 'made good' by being put in the position he or she would have occupied had the representation been true.

Whether the contract is rescinded or upheld, damages are recoverable in respect of the consequential losses flowing from the fraud. Where the contract is rescinded and restitution ordered, the representee's loss on the transaction itself is generally wiped out by the process of restitution and his or her damages are thus usually limited to wasted costs and other such consequential losses. Where the contract is upheld, the representee may suffer a loss on the transaction itself.

To be compensable, the loss in question must be casually connected with the fraud. In a case of *dolus dans,* there would have been no contract at all but for the fraud.

This entails awarding the innocent party the value of his or her performance, less any benefits which he or she has received from the other party under the contract. In a case of sale, for example, his or her net loss is the price paid for the merx, less its actual or fair value at the time of purchase. Both losses and benefits have to be taken into account, since both flow directly from the misrepresentation; thus if, in spite of the misrepresentation, the representee has made an overall profit on the transaction, he or she is not entitled to any damages – the so-called swings-and-roundabouts principle (*Ranger*).
Eg: If he or she paid R800 000 for a house worth R900 000, and he or she would not have brought at all but for a misrepresentation that the house had recently been rewired, he or she cannot recover the R20 000 that it has cost to rewire the house, since what he or she loses on the swings (R20 000) is more than compensated by what he or she gains on the roundabouts (R100 000).

In a case of *dolus incidens,* where the effect of fraud was merely to influence the terms of a contract which would in any event have been concluded, the representee's loss cannot be measured by comparing the values of the respective performances of the parties, since neither was fully induced by the representation. Rather one should measure the extent to which the representation inflated the performance that the representee was prepared to make under the contract.

In *Ranger's case,* it was held that where a thing is misrepresented to be free from defects, the damages may be measured by the cost of removing the defect. With respect, it is submitted that, despite the obvious practicality of such an approach, it amounts to making the representation good; that is the contractual measure.

The decision in *Bayer SA v Frost* placed the remedies for intentional and negligent misrepresentation on an equal footing.
Since a culpable misrepresentation is a delict, the measure of the misrepresentee's damages is the normal delictual measure and that is that damages are calculated according to the plaintiff's negative interest. That means that the misrepresentee must, by the award of a sum of money, be placed in the **hypothetical** (assumed) position in which he would have been had the delict not occurred.
He can never claim to be placed in the position in which he would have been had the misrepresentation been true.
A rule of thumb is always to decide how much worse off the misrepresentee is **financially** as a result of the misrepresentation.
Where the contract is rescinded restitution takes place and the misrepresentee's loss will normally take the form of wasted costs, which he may have incurred in connection with the conclusion and cancellation

of the contract. Whether such reimbursement may be regarded as damages proper or merely part of restitution itself is not clear but this distinction will be of little importance in most cases.

Negligent misrepresentation

Bayer South Africa (Pty) Ltd. The court held that there was no good reason why the general action for negligent misstatements recognized in the *Trust Bank* case should not be applied in the pre-contractual sphere, to a negligent misrepresentation inducing a contract. This was subject of course to all the requirements for Aquilian liability being satisfied, with particular emphasis being placed on the elements of wrongfulness and causation affording the courts with the necessary means of controlling the scope of this new form of liability.

Innocent misrepresentation

Can a party induced to contract by an innocent misrepresentation is entitled, instead of rescinding the contract, to abide by it and claim the financial equivalent of rescission and restitution: 'restitutional damages', 'partial restitution', 'reduction of performance' or '*quanti minoris* type damages', such as relief has at various times been called.

In the case of sale, relief is now sometimes available under the *action quanti minoris.*

Phame (Pty) Ltd: In that case a purchaser who had been induced to contract by a seller's unfounded *dictum et promissum* may invoke the aedilitian remedies: if he or she would not otherwise have bought at all, he or she may cancel the contract with *action redhibitoria.* The purchaser may instead choose to abide by the contract and claim a reduction of the purchase price with the *action quanti minoris.* Since a *dictum et promissum* (as defined in *Phame*) is essentially misrepresentation as to the quality of the merx and is actionable even if made without fraud or negligence, the purchaser is in effect afforded a remedy in 'damages' for innocent misrepresentation.

The relief obtainable under the *action quanti minoris* is limited to a reduction of price; in the absence of fraud or a warranty, the purchaser is not entitled to consequential damages, except perhaps when the seller is a manufacturer or merchant seller who publically professes to have attributes of skill and expert knowledge in relation to the kind of goods sold. The measure of reduction is not the difference between the agreed price and the price that would have been paid but for the misstatement,

as in the cases of *dolus incidens,* but rather the difference between the price paid and the actual value of the merx. Purchaser would in any event have paid more for the merx than it was worth, it will suit him or her better to allege an innocent *dictum et promissum* than a fraudulent misrepresentation.
The aedilitian actions apply only to the contract of sale, and only to misrepresentations that fall within the concept of a *dictum et promissum.*

In view of the criticism leveled at the granting of the **actio quanti minoris** on the ground of an innocent misrepresentation, it was only to be expected that the whole matter would sooner or later be submitted to the **AD**, and the court was asked in =

to decide upon the following questions:

(1) Can an innocent misrepresentation ever entitle a buyer to a reduction of the price under the actio quanti minoris?
(2) If so, under what circumstances?

These questions the **AD** answered as follows?

(1) The aedilitian remedies are available if the thing sold suffered from a latent defect at the time of the sale.
(2) The aedilitian remedies are also available if the seller made a **dictum et promissum** to the buyer upon the faith of which the buyer entered into the contract or agreed to the purchase price in question; and it turned out to be false.
(3) A dictum is a material statement made by the seller to the buyer during the negotiations, bearing on the quality of the thing and going beyond mere praise and commendation (**puffing**).
(4) Where a statement by the seller goes beyond puffing will depend on the circumstances of each case.

Misrepresentation by silence: non-disclosure

A party who has been induced to a contract by unlawful non-disclosure of material information is entitled to the same remedies as the victim of any other misrepresentation.
The general rule is where conduct takes the form of an omission, such conduct is *prima facie* lawful.
The general rule is still that a contracting party is under no legal duty to disclose information known to him or herself, but not to the other party, even if he or she is aware that the disclosure would influence the other's decision whether, or on what terms, to enter the contract. The rule has

always been subject to a number of exceptions, and as the policy considerations underlying these exceptions have become more apparent. The exceptional cases where the law imposes a duty to speak include the following:

1. *Where the contract is one of insurance, agency, partnership or engagement.* A party seeking insurance, for example, must disclose any fact that could reasonably be expected to influence the risk, whether asked about such fact or not.
2. *Where there is a fiduciary relationship between the parties,* like between attorney and client or guardian and ward.
3. *Where a statute imposes a duty of disclosure.* I.T.O the Companies Act.
4. *Where the seller has knowledge of a latent defect in the thing he or she is selling.*
5. *Where an applicant for credit is an unrehabilitated insolvent.*
6. *Where a party's prior conduct or statement renders silence misleading.*

In all these cases, the duty to disclose does not derive from an implied term of the contract; it is simply imposed *ex lege.* The basic idea is that contracting parties are required to behave in accordance with the dictates of good faith.

This test of involuntary reliance found favour with our courts and has been applied in virtually all of the subsequent cases involving non-disclosure. Its influence is readily apparent in the general test for liability recently adopted by the Supreme Court of Appeal – *Absa v Fouche.*

CASES:

In the *Trotman v Edwick* case, 2 sellers told the buyer that the property they were selling him included a strip of municipal land.
The council did however, later build on that land.
The buyer therefore sued the sellers for intentional misrepresentation.
The court held that he could get damages.
Therefore, the buyer got the difference of what he paid and the current market value of the property.
In *De Jager v Grunder*, the buyer (D) and seller (G) entered into a contract described as a sale but in fact it was an exchange.
The thing 'sold' was G's farm with cattle and equipment and the price 'paid' was D's farm X and Z, including cattle and equipment and a further R7000.
To work out the cash amount D paid, they valued all 3 farms.
But D made an intentional misrepresentation.

However, the court said that the price paid minus the actual value of the farm was G's damages.

In *Ranger v Wykerd*, R bought a house with a swimming pool for R22 000.
R asked W if the pool was structurally sound.
W said yes even though he knew it was cracked.
R bought the house and the pool leaked.
He had to pay R1 250 in repairs.
R sued W for R1 250.
He further said that he would have paid R20 750 for the house had he known the truth about the cracked pool.
The court said that the reasonable amount paid for pool repairs is generally R1 000

Exclusionary clauses

- Contracts often contain **exclusionary** clauses that either limit or exclude the remedies available to either or all the contracting parties.
- The remedies for negligent and innocent misrepresentation can be excluded by agreement between the parties, but **not** the remedies for intentional misrepresentation. (*Wells v SA Alumenite Co)*

DURESS (force or fear):

Duress occurs where a prospective contractant is forced or compelled by the other contractant, or someone for whose acts he or she may be held liable, to enter into a contract. The decision on the part of the innocent party to enter into the contract has been influenced by the improper conduct of the other party. Thus, in the same way that a misrepresentation that does not vitiate consent to the contract renders the contract voidable (rescindable), so consensus that has been obtained by way of duress renders the contract rescindable. Consensus is present, but it has been obtained in an improper (wrongful) manner. This improper conduct on the part of one contractant renders the contract voidable at the instance of the other party.
Since duress may be regarded as a delict, a contractant who wishes to avail himself of the remedies for duress should prove the existence of the elements required for delictual liability, just as in the case of a culpable misrepresentation.

The courts do not express the requirements for redress on the basis of duress i.t.o. the elements of a delict.
In *Broodryk v Smuts* the court expressed the elements necessary to set aside or rescind a contract on the ground of duress as follows:

(1) There must be actual violence or reasonable fear.
(2) The fear must be caused by the threat of some considerable evil to the contractant or his family.
(3) It must be the threat of an imminent or inevitable evil.
(4) The treat or intimidation must be contra bones mores.
(5) The moral pressures used must have caused damages.

The approach of the court to the requirements for redress on the basis of duress indicates that the following is usually required:

(1) There must be an act of duress which is the cause of the contract.
(2) It must be an unlawful or illegal action which is threatened.
(3) The threat must be aimed at the life, person, honour or property of the person threatened or his next of kin.
(4) The duress must contain a threat of immediate and unavoidable harm and the fear must be reasonable, justified and not frivolous.
(5) The threat must come from the other contracting party or a 3rd party.

Remedies for duress (consequences of duress)

Rescission and restitution

- The other party may claim rescission of the contract and restitution of any performance made i.t.o. the contract.

Damages

- If the aggrieved party has suffered loss he should be able, as in the case with culpable misrepresentation, to claim damages.

Undue influence:

In *Preller v Jordaan*, the **AD** accepted that the doctrine of undue influence is part and parcel of our law and held that the sources of common law indicate that the concept of dolus is wide enough to cover instances which would be regarded in English law as undue influence.

In *Patel v Grobbelaar*, the **AD** reaffirmed the decision in the Jordaan case and held that where a party to a contract requests a court to set aside

the contract on the ground of undue influence, an onus rests on that party to prove:

- That the other party exercised influence over him
- That this influence weakened his power of resistance and made his will pliable
- That the other party exercised this influence in an unscrupulous manner in order to induce him to consent to a transaction which firstly was to his detriment and secondly, which he with normal free will would not have concluded

If the person who holds a position of trust in such a relationship, takes advantage of the trust placed in him in order to influence the other party into entering into a contract with him, and in so doing obtains a benefit which he would not enjoy were it not for the relationship of trust existing between them, it is accepted that he has exercised undue influence on the other party.
The contract may then be rescinded at the option of the innocent party.

Examples of such relationships of trust are those of parent and child, attorney and client, doctor and patient, etc.

However, this is not the legal position in our law.
The existence of a relationship of trust can be used as proof of the existence of the above requirements.

Remedies for undue influence (consequences)

Rescission and restitution
Undue influence renders the contract voidable at the instance of the aggrieved party. Traditionally rescission and restitution are the only remedies available on this ground.

Abuse of circumstances:
This is where A unconscionably exploits an emergency situation in which B finds himself to secure B's consent to a prejudicial contract (the emergency not having been caused by A). *Blackburn v Mitchell* – a ship was stranded in Table Bay and the tug boat captain offered to tow the boat to dock for an exorbitant fee. The captain of the ship agreed reluctantly, and promised to pay, adding that the money would never be paid. The tug towed the ship to dock and the money was not paid. The tug captain sued for the money. The court said the ship captain was not bound by the agreement but was bound to pay a reasonable amount for the towing.

Traditional grounds for rescission of a contract:

- Authors state our law traditionally approaches the matter of voidability on the assumption that 2 specific grounds for rescission existed namely duress and misrepresentation.
- It was eventually necessary to recognize another ground for rescission and this was undue influence.

Consensus obtained by improper means:

- The one contractant has obtained the other's consent to the contract as a whole or it specific terms in an improper manner like by inducing the other party to contract by way of a misrepresentation.
- The traditional grounds for rescission – misrep, duress and undue influence – would then be examples of a general ground for rescission.
- A further consequence of the recognition of a general ground for rescission is that the grounds for rescission in specific cases could readily be extended and not be limited to the existing 3.

Commercial Bribery:

- In *Plaaslike Boeredienste v Chemfos*, the Appellate Division went beyond the existing grounds for rescission in considering a claim for rescission of a contract. Here, the contractant had bribed the agent of the other contractant to persuade the latter to conclude a contract. Although fraud (intentional misrep) was advanced as the ground for rescission, the court held that the act of persuasion through bribery did not constitute fraud as such but amounted to an improper means of obtaining consensus. According to authors, the approach adopted by the court indicates that the AD seems to have restarted the grounds for rescission in terms of the underlying general principle that a contract may be rescinded by a contractant whose consent to it was obtained by improper means. This raises the possibility that the traditional grounds for rescission may be called one general ground.
- In *Extel v Crown Mills*, the SCA was confronted with a contract engineered by the bribery of the principal's agent by the other contracting party. The court, approving the *Chemfos* decision held that in such cases of commercial bribery the agreement between the briber and the person bribed is void for want of legality, while the ensuing agreement between the briber and the innocent contracting party is voidable at the instance of the innocent party.

  The court did not however find that the existing grounds for the rescission of a contract in this context have been included under

one general ground. The court confirmed that commercial bribery is a distinct ground for rescinding a contract and that it has the following elements:

1. A reward
2. paid / promised
3. by one party – the briber
4. to another – the agent
5. who is able to exert influence over
6. a third party
7. with the intention that the agent
8. should induce the principal
9. without the latter's knowledge and
10. for the direct or indirect benefit of the briber
11. to enter into or maintain / alter a contractual relationship
12. with the briber / his principal /associate / subordinate.

POSSIBILITY:

Different types of impossibility:

Subjective and objective impossibility

To render performance impossible, it is not sufficient that a particular party cannot perform – that is, mere **relative** or **subjective impossibility** is not enough. The impossibility that must be so serious that nobody can render the performance – that is, it must be **absolute** or **objective impossibility.**

INITIAL PERFORMANCE UNDER THE CONTRACT MUST BE POSSIBLE:

A contract is void if at the time of its conclusion performance is impossible (*Wilson v Smith*.)

Performance should be objectively impossible

A party to a contract cannot be blamed for the impossibility, for example where the house burnt down before conclusion of the contract and the parties were unaware

The consequences of impossibility

No obligation arises if performance is objectively impossible. There cannot be a claim for either performance or contractual damages based on breach. Anything given in purported fulfilment of the non-existent obligation has to be returned. The duty to return can be enforced with a claim based on the unjustified enrichment of the recipient.

Where performance of the contractual obligations is only **partially impossible** at the time of agreement, the contract could be regarded as invalid in its entirety – or, obligations could arise in respect of those performances that are still possible. The **divisibility of the performances** is important in determining which of these consequences ensue.

Certainty:

Contracts containing a mechanism whereby certainty ban be obtained

- *Certainty is obtained with reference to a mechanism contained in the contract.*
- *Certainty is obtained with reference to an objectively determinable external standard or mechanism. In Shell (SA) (PTY) Ltd v Corbitt*, a contract that granted Shell a preference to sell petroleum products with reference to the 'latest price lists ruling at the time' was regarded as valid. More difficult though, is the position where the parties agree that performance should be at a '**reasonable price**'. South African law rather paradoxically accepts that one can enter into an agreement to render a service at a reasonable price, although it has traditionally disapproved of an agreement to sell something at a reasonable price, or to rent out at a reasonable rental. To confuse matters even further, the courts have held that tenants can agree to be liable for reasonable expenses. This fragmented approach has been criticised, since it is not clear on what grounds these various forms of performance should be treated differently.
- *Certainty is obtained through a determination by a third party.* A **third party** can determine what has to be performed as long as the third party is identifiable, and exercises the discretion objectively and reasonably. The contract can of course determine what degree of latitude should be accorded to the third party in making the determination. If the determination is manifestly unjust, a court can adjust it, but there is no duty on the aggrieved party to accept the adjusted performance.
- *Certainty is obtained through determination by one of the parties. NBS Boland Ltd v One Berg River DRIVE CC*, that a party can enjoy discretion to determine what the other party has to perform. The

general principle was formulated as 'save, perhaps, where a party is given the power to fix his own prestation, or to fix a purchase price or rental, a stipulation conferring upon a contractual party the right to determine the preststion is unobjectionable'. In that case, a clause in a morgage bond agreement that granted the holder of the morgage bond (that is, the bank) the discretion to vary the rate of interest payable by the debtor was regarded as valid. As long as the discretion is exercised reasonably, the determination would be valid. On the facts, the discretion to increase the interest rate was indeed properly exercised.

The consequences of not meeting the certainty requirement

An obligation that does not meet the certainty requirement is invalid. If such an obligation is **severable** – that is, may be separated – from the other obligations created by a contract, the other obligations could remain in force. The contract is then only partially invalid.

If it is not possible to sever the offending obligation, the contract as a whole is void. This may prove to be rather unsatisfactory if the offending clause was supposed to protect only one of the parties, and that party wishes to uphold the contract. There is some support in the case law for granting that party (in whose favour the clause would have operated) the power to elect to abide by the contract.

Transfers made in purported fulfillment of obligations that are void due to uncertainty are retained without legal ground. This means that these transfers can be reclaimed with remedies based on unjustified enrichment.

LAWFUL:

Agreements in restraint in trade

An underlying principle of the law of contract is that agreements seriously entered into should be enforced. This finds expression in the principle of **sanctity of contract** (*pacta sunt servanda*). On the other hand, agreements contrary to public policy will not be enforced. Considerations of **public policy** indicating that an agreement should not be enforced are to be found in legislation, the common law, good morals and the public interest.

Illegal contracts that are void

Public interest

The courts often state that a contract is illegal because it is contrary to good morals on the one hand, or public policy on the other.
In *Sasfin*. *Agreements which are clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counterto social or economic expedience, will accordingly, on the grounds of public policy not be enforced.*
Recognised public interests include:

- Voluntarily concluded contracts should be compiled with an enforced (sanctity of contracts);
- Simple justice between individuals should be taken into account;
- As far as possible, the parties to a contract should have equal bargaining power;
- The administration of justice should not be defeated, obstructed or perverted;
- The safety of the State;
- The public service should function properly; and
- The full exercise by persons of their legal rights should not be interfered with.

What is the correct approach to a contractual term that conflicts potentially with a constitutional provision?

Recently, in *Barkhuizen v Napier*, the Constitutional Court discussed the question whether the validity of the contractual term can be directly tested against the provision of the Bill of Rights. The majority seriously doubted the appropriateness of such an approach, because of two insurmountable obstacles related to the fact that the contractual term is neither a law of general application, nor conduct. The first difficulty is that a contractual term cannot be subjected to a limitation analysis under s36(1) of the Constitution, as this section only applies to a law of general application. The second difficulty is that s172(1)(a) of the Constitution cannot apply to contractual terms as this section requires a court to declare a law or conduct inconsistent with the constitution as invalid.
The correct approach to a constitutional challenge to a contractual term therefore is to determine whether the term of the contract is contrary to public policy.

Statutory illegality

A contract is void where the relevant statutory enactment expressly so provides, example, sale of dangerous weapons.
The particular statute has to be interpreted and the courts take the cumulative effect of the following factors into consideration in determining whether the legislator impliedly intended the contract to be void:

- What is the object of the statute and what mischief (harm) is the statute directed against? If the validity of the contract brings about the harm the statute is directed against, it is an indication that the legislator intended the contract to be void.
- Does the enactment impose a criminal sanction? This is usually an indication that the legislator intended the contract to be void. However, this is not the case where the sanction provides adequate protection against the mischief that the statute is directed against.
- Does the enactment merely server to protect the revenue of the state? If the answer is in the affirmative, it is an indication that the legislator intended the contract to be valid.
- Does the provision merely protect individuals or does it involve a public interest that requires protection by voiding the contract? If the provision is for the protection of the public, it would be an indication that the legislator intended the contract to be void.
- What are the consequences of a particular interpretation of the contract? A balance-of-convenience test is employed that questions whether nullity of the contract would cause greater inconvenience and injustice than allowing the legal conduct to stand.

Unfair contracts

The unfairness or unreasonableness of a contract (or clause) towards one of the parties as well as the interest that the other party seeks to protect with the contract, are taken into account. *Barkhuizen.*
Notions of fairness, justice and equity, and reasonableness cannot be separated from public policy. Public policy is informed by the concept of ubuntu.
What is the role of principle of good faith plays in determining what is fair and reasonable in a contract. Good faith has been recognised as a fundamental principle that underlies the law of contract and informs its various rules and principles, including those regarding illegality.
Although good faith may have a subjective or objective meaning, commentators have suggested an objective test: has the one party so unreasonably and one-sidedly promoted his or her own interest at the

expense of the other party that this infringement of the principle of good faith outweighs the public interest in the enforcement of the contract? The unfairness and unreasonableness of a contract is in itself insufficient reason for declaring the contract contrary to public policy, as the courts do not have a general equitable jurisdiction to declare unfair or unreasonable or unconscionable contracts invalid.
In *Sasfin (Pty) Ltd v Beukes*, two contractual terms gave S (a financier) immediate and effective control of B's income as a doctor. B was furthermore not able to end this situation; only S could. The contract gave protection to S beyond what was reasonably necessary to protect its interest in having security for B's indebtedness. The Appellate Division found that the terms placed B in the position of a virtual slave working for the benefit of S. The court concluded:
An agreement having this effect is clearly unconscionable and incompatible with the public interest, and therefore contrary to public policy.

In *Barkhuizen*, a time limitation clause in a short-term insurance policy released the insurer from liability of the insured failed to server summons on the insurer within 90 days after the insurer repudiated a claim submitted under the insurance policy. Such a clause limits the right of the insured to seek legal redress. Court found that this right is not only a constitutional right, but also constitutes a public interest.
The legislator granted the courts and equitable jurisdiction in the Consumer Protection Act. Section 48(1)(a) prohibits a supplier from offering goods or services at an unreasonable price or on terms that are unfair, unjust and unreasonable.
Examples:

- If the contract is so excessively one-sided in favour of the party other than the consumer;
- If the contract is so adverse to the consumer as to be inequitable;
- If a term is unfair, unreasonable or unconscionable;
- If the attention of the consumer has not been drawn to the fact, nature or effect of certain terms of the contract.

A court may take the following factors into account to determine whether the contract is in whole or in part unconscionable, unjust, unreasonable or unfair:

- Circumstances of the contract that existed or were reasonably foreseeable at the time the conduct occurred or the contract was concluded;
- The conduct of the parties respectively;
- Whether the consumer had to do anything that was not reasonably necessary for the legitimate interest of the supplier as a result of the conduct of the supplier;
- The fair value of goods or services;

- The amount for which and circumstances under which the consumer could get identical goods or services from a different supplier;
- Whether the goods were manufactured.

Unfair enforcement of a contract:

The unfair enforcement of a contract could be contrary to public policy. In *Brisley v Drotsky,* the Supreme Court of Appeal assumed, that the *Sasfin* principle could be extended to the enforcement of contractual terms. The parties had concluded an oral agreement contrary to a non-variation clause in a lease agreement. The lessee was late in payments of the rent in reliance on the oral agreement, but after accepting late payment for five months, the lessor cancelled the lease. The court found that the lessee's case fell far short of the requirement of exceptional unfairness.
Court held, that the enforcement of a clause would be invalid if the enforcement was so unfair or unreasonable in the circumstances that its enforcement was contrary to public policy.

The consequences of a contract that is void for illegality
It is an absolute rule that an illegal contract cannot be enforced.

1. **Contract cannot be enforced (*ex turpi* rule)**
   An illegal contract is void or invalid since one of the requirements or a valid contract is absent. An illegal contract creates no obligations and consequently, it cannot be enforced.
2. **Severing the illegal part of a contract**
   A contract is sometimes only **partially legal.** The courts have in certain cases allowed the illegal part of a contract to be severed from the rest, thus permitting the remainder of the contract to remain in force. In some instances, the courts have refused to do so, even where severance is possible, because public policy requires the whole contract to be void.
3. **Reclaiming performance that has been made in terms of an illegal contract (the *par delictum* rule)**
   If a contract is void and there has been performance, the restitution of what has been performed should, in principle, be granted. Where ownership of the performance has not passed, the performance can be reclaimed with the *rei vindication.*
   However, the ***par delictum* rule** (where two parties are equally morally guilty, the one who is in possession is in the stronger position), will prevent restitution from taking place. This rule does

not preclude the enforcement of an unlawful contract by means of a claim for specific performance, but it does prevent a party from reclaiming his or her performance in terms of an unlawful contract.

The consequences of illegality – NBNB CASE JAJBAHAY 10 MKS!

- The first consequence of the illegality of a contract is that such a contract is void.

Suppose that A sells a cow to B on a Sunday and suppose further that such a sale is prohibited by statute; the purchase price is paid, but the cow is not delivered.
2 questions arise:
(1) Can B claim delivery of the cow from A?
(2) Can B recover the purchase price from A?

- In the **first** case B relies on the **contract**; in the **second** case his action is founded on a totally different cause, namely on the fact that A has been **unjustifiedly enriched** at the expensive of B.
- In the first case, therefore, B's action will be a contractual action, but in the second case, an enrichment action.

No enforcement

- The answer to the first question above is '**no**'.
  No enforcement can be claimed.
- The first consequence of nullity of an illegal agreement is that neither party may institute an action on the contract.
- This is because of the rule '**ex turpi causa** (no action arises out of a base consideration (cause)).
- This is an **absolute** rule to which there are no exceptions.
- Even the fact that one of the parties has already performed his undertaking does not make any difference, because his performance does not render the contract legal.

- The one party may not only not claim performance from the other, but the unlawfulness of the contract also means that a party who has suffered damage as a result of such contract may not claim damages from his adversary by relying on the contract.

  Relief:

- Because the agreement is void, restitution should, in principle, be granted.

- Now there is another rule in our law which prevents B from claiming the return of the purchase price, namely **par delictum** (a very important rule which means, in effect: where 2 parties are of equal guilt, the one who is in possession is in the stronger position).
- The **par delictum** rule is founded on consideration of public policy; the court will do everything in its powers to discourage unlawful contracts.
- At the same time it is clear that the rule may sometimes operate very harshly with regard to the plaintiff, and for this reason, it may be relaxed by the courts.

Where the parties are not equally guilty

- The thought underlying the **par delictum** rule is that he who has acted disgracefully by making performance should not be allowed to recover such performance.
- From this it follows that where a party to an unlawful agreement has performed but performance by him was not disgraceful, he can recover from the other party, that which he has performed.

- It stands to reason, further, that the **par delictum** rule applies only in cases where the parties are in fact equally guilty.
- Thus if B entered into a contract as a result of A's misrepresentation, if he did not know of the illegality of the contract, or if for any other reason he is less guilty than A, the court will certainly grant him relief.
- In such a case, no consideration of public policy to deprive B of his right to recover.

Relaxation of the par delictum rule

- Before 1939 the courts applied the **par delictum** rule rigorously and made no exceptions.
- For example, in the *Brandt case*, the sale of a cow on a Sunday was involved and the court refused to allow the plaintiff any redress.

- In 1939, the AD reconsidered the law on the point and formulated a new and most important principle.
- The case was the *Jajbhay case.*
- Briefly, the AD argued as follows: the **par delictum** rule is founded on principles of public policy; but public policy also demands that justice shall be done; therefore it cannot be in the public's interest to enforce the **par delictum** rule where this will be patently unjust towards the plaintiff.

- This rule is therefore to be applied as a general rule, to which an exception must be made whenever 'simple justice between man and man' demands it.
- *Klokow v Sullivan:* No definite criteria have, however, been laid down to decide whether the rule should be relaxed or not. The issue of relaxation may arise in such an infinite variety of circumstances that it would be unwise for the courts to shackle their own discretion by predetermined rules or even guidelines as to when relaxation of the *par delictum* rule will be allowed.

BRIEF:

Contract valid but unenforceable

There are **2** contracts where the illegality of the contract does not have the effect that the contract is void, but only that it is unenforceable.

- Certain wagering and gambling contracts and,
- Contracts in restraint of trade which are against public policy.

Wagering and gambling contracts

1. *General rule*

- At common law wagering agreements were not void, and still today are not void, but unenforceable.

- Where the wagering agreement or the type of gambling is not expressly prohibited, an obligation is in fact created, but it is an unenforceable obligation, also known as a naturalis obligatio.

- The test in such a case to my mind should be whether the court is asked, in effect, to enforce the unenforceable claim; in other words, is the later transaction on which the plaintiff relies merely a device for enforcing his original claim, is it merely his original claim clothed in another form or with some term or condition added to it.

2. *The position **between** the parties*

(1) A wagering agreement cannot be enforced by means of an action.
(2) A wagering debt may be validly discharged by payment of the debt.
(3) A wagering debt is capable of being ceded.
(4) A wagering debt cannot be novated, or serve as basis for a suretyship.
(5) A wagering debt is capable of being set-off.

(6) A wagering debt cannot be enforced by means of a delictual action.

*3. The position of **agent** and **stakeholder***

Where A instructs C to enter into a wagering agreement with B there are in fact 2 contracts.

- **Firstly**, the contract of mandate i.t.o. which C is appointed as legal representative.
- **Secondly**, the wagering agreement which C enters into with the other party, B, in A's name and on his behalf.

The position between the agent and the stakeholder is as follows:

(1) The contract of mandate is revocable.
(2) The agent is not liable to his principle for breach of contract.
(3) The principle may sue his agent for any stake which the latter has received from the other party.
(4) The agent may hold the principle liable for expenses incurred in carrying out his instructions.

4. The position as regard loans made by and to parties to a wager or gamble

(1) A loan made by an outsider to any of the parties to a wager may be reclaimed.
(2) A loan by one of the parties to the wager or game, to any other party, in order to enable the latter to continue with the wager, cannot be reclaimed.
(3) A loan by one of the parties to any other party at the time of settling up **after** the wager, may be reclaimed

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Agreements in restraint of trade

Agreements in restraint of trade are characterised by the limitation of someone's freedom to carry on a profession, trade or business.

- Contracts of employment, where the employee undertakes not to compete with his or her employer after he or she has left the employer's service;
- Sales of a goodwill of a business, where the seller agrees with the purchaser not to carry on a similar business in competition with the purchaser; and
- Partnership agreements, where each of the partners undertakes not to compete with the partnership after leaving it.

The enforcement if a restraint brings two contractual values into play: sanctity of contract and freedom of trade.
Initially, the courts have preference to **freedom of trade** under influence of the English law.
However, in *Magna Alloys and Research (SA)(Pty) Ltd v Ellis,* the Appellate Division overturned this approach in favour of the sanctity of contract. A contract in restraint of trade is now valid and enforceable, unless the party wishing to escape the consequences of the agreement can prove that the restraint is contrary to public interest and thus unenforceable. The restraint denier consequently bears the onus of proving that the enforcement of the agreement is contrary to policy. The court also held that an agreement in restraint of trade that is contrary to public policy, is not void, but only unenforceable.
In *Basson,* restraint of trade clause is contrary to public policy if the consequence of the restraint is unreasonable. The reasonableness or otherwise of restraint is decided by weighing the interests of the community on the one hand, and the individual interests of the contracting parties on the other hand.
In *Basson,* the court proceeded to formulate a test to determine whether an agreement in restraint of trade is reasonable. This test has proved authoritative. The court posed the following four questions:

1. Firstly, is there an interest of one party worthy of protection?
2. If so, then secondly is that interest threatened by the conduct of the other party?
3. If that is further so, then thirdly does such interest weigh up qualitatively and quantitatively against the interest of the other party to be economically active and productive?
4. Fourthly, is there another aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint should either be maintained or rejected?

The *first question* of the *Basson* test requires that the interest protected by the restraint of trade agreement should be worthy of protection.
There is no exhaustive list of **protectable interests,** 'proprietary interests', goodwill and confidential information are two generally recognised proprietary interests.
The *second question* of the *Basson* test enquires whether the protectable interest is threatened by the conduct of the other party. This will be the case when the interest is infringed, but the mere risk of infringement, objectively assessed, will suffice.
An example of such a risk is the relationship that an employee has with customers is of such a nature that when he or she leaves employment, the customers will be easily induced to follow him or her to a new business and to infringe the former employers goodwill.

The *third question* of the *Basson* test involves weighing up of the protectable interest(s) of the one party (restraint enforcer) against the interest of the other party (restraint denier) to be economically active and productive.
The question as to the reasonableness of a restraint depends on the facts of every case.
The *fourth question* of the *Basson* test involves any further relevant aspect of public policy, other than the reasonableness or unreasonableness of the restraint as between the parties. The reasonableness of a restraint as between the parties is only an indication of whether it probably is against public policy or not.

In *Magna*, it was held that the question whether a restraint is in conflict with the public interest is to be assessed with regard to the circumstances prevailing at the time when enforcement of the restraint is sought.

In *Magna Alloys*, the court also held that an agreement in restraint of trade may be enforced partially. The reasons for partial enforcement are that the requirements of public policy in restraint of trade cases relate directly to the effect of the courts order and not primarily to the terms in which the parties happen to have agreed, and the public interest requires partial enforcement in appropriate instances. The power of the court to allow partial enforcement is subject to certain limitations.

- The party seeking partial enforcement must raise the issue and establish a basis for partial enforcement. The party who does not wish to be bound by the restraint still bears the onus of proving that partial enforcement is contrary to the public interest.
- A court will not partially enforce an unreasonable restraint that requires a drastic recasting of its provisions to make it reasonable ('major plastic surgery'). The question is whether partial enforcement will materially alter the contract.
- There is no exhaustive list of factors that a court will take into account in determining whether partial enforcement is justified. Two relevant factors are whether the restraint clause was calculated to be unduly oppressive or designed to terrorise, and whether partial enforcement would operate harshly or unfairly towards the person bound by the restraint.

FORMALITIES:

Formalities prescribed by law

Various statutes require. Formalities require that the contract be **in writing** and be **signed** by one or more of the parties and sometimes the contract should also be notarially executed and registered if it is to be effective against third parties.

Although the wording of each statutory provision prescribing writing as a formality determines the actual scope of the provision, the following general comments may be made:

- All the material terms of the contract must be in writing, not just the *essentialia.*
- Terms implied by law (*naturalia*) obviously need not be in writing, tacit terms also do not need to be in writing.
- The terms do not all need to be in one document.
- Any variation of the material terms of the contract has to be in writing to be effective.
- Sometimes a party misleads the other party by agreeing to an oral variation of the contract, only later to rely on the formal invalidity of the variation of their contract.
- If the formalities are not compiled with, the contract is void.

Prescribed formalities required for validity

The law requires certain types of contract to be in writing and to be signed by the parties in order for the contracts to be valid.

1. Alienation of land
2. Suretyship
3. Donation

Prescribed formalities required for enforcement against third parties

1. **Antenuptial contracts**
2. **Long leases of land**

   A **long-term lease of land** only has effect against a creditor, or successor under onerous title of the lessor, for a period of longer than ten years after having been entered into, if it has been registered against the title deed of the leased land.

Formalities in electronic contracts

Electronic Communications and Transactions Act provides that a requirement in law that a document or information must be in writing is met if the document or information is in the form of a data message and

is accessible. This does not apply to alienations of land and agreements for the long-term lease of immovable property in excess of twenty years. Act provides that an electronic signature can now serve as the functional equivalent of a 'wet' signature. Electronic signatures can take a variety of forms and depending on the nature of the transaction, can be simply writing your name at the end of an email message. An **advanced electronic signature** is defined as an electronic signature resulting from a process that has been accredited by the Director-General of the Department of Communications acting as the Accreditation Authority.

Formalities stipulated by the parties

Creation of the contract

The parties to an oral agreement will often agree that their agreement should be reduced to writing, and perhaps also be signed. In doing so, they may have either of two very different purposes in mind.

1. The parties may wish to have a written record of the agreement merely to facilitate proof of its terms. If so the agreement is binding even if it is never reduced to writing.
2. Alternatively, the parties may intend that their oral agreement will not be binding upon them until it is reduced to writing and signed by them. In this case, the prior oral agreement lacks contractual force and will become a contract only if or when there is compliance with the stipulated formalities. Neither party can compel the other to sign the agreement.

The leading case is *Goldblatt v Fremantle*. F undertook (orally) to supply G lucerne at intervals. The parties agreed that F would reduce their oral agreement to writing and that G would confirm it in writing. F would set out the terms of their agreement in a letter and asked G to confirm the terms in writing. When G failed to do so, F stopped supplying G with lucerne. G claimed contractual damages from F. The Appellate Division held that no contract existed because the parties intended their agreement to be concluded in writing, which also signing by both parties. The intention of the parties with regard to what 'in writing' means, is of course decisive, but in the absence of the evidence about their intention, the conclusion of an electronic contract that complies with the requirements of s12 of the Electronic Communications and Transactions Act should usually comply with the stipulated formality of writing.

Variation of the contract: non-variation clauses and the *Shifren* principle

The parties to a contract may also prescribe certain formalities for any variation of their contract. In fact, it has become an extremely common practice to insert an **non-variation clause** in any written contract, the

standard wording being more or less as follows: 'No variation of this agreement shall be of any force or effect unless reduced to writing and signed by the parties to this agreement'.
SA *Sentrale Ko-operatiwe Graanmaatskappy Bpk v Shifren.* Court held non-variation clause was not against public policy and that no oral variation of the contract was effective if the clause entrenched both itself and all the other terms of the contract against oral variation. The purpose of the clause was to prevent disputes and problems of proof that might otherwise arise if oral variations were permitted; and it operated in favour of both parties.
The application of the ***Shifren*** **principle** can produce results that appear to be unjust. **E.g:** A landlord may orally agree that the tenant can pay the rent late, but then later cancel the contract on this ground, relying on the non-variation clause. This has led many courts over the years to attempt to soften or even circumvent the *Shifren* principle by invoking doctrines relating to waiver etc.
More recently, the courts (SCA) have reaffirmed its earlier decision in *Shrifren* in the case of *Brisley v Drotsky*. A non-variation clause operated for the benefit of both parties and does not detract from constitutional considerations of equality.

Cancellation of the contract: non-cancellation clauses
The general rule is that parties are free to cancel their contract at anytime, by mere agreement.
Impala Distributors: it has become standard practice to insert a written contract a **non-cancellation clause,** prescribing certain formalities for the cancellation of the contract.
Such clause is restrictively interpreted and applies only to consensual cancellations; situations where the contract is terminated by mutual consent; it will not prevent a party from cancelling the contract unilaterally on the grounds of breach of contract by the other party.
In the *Impala* case, the non-cancellation clause stated: 'This agreement may be terminated by mutual consent in writing of the parties.' The contract also contained a non-variation clause. The court held that but for the non-variation clause the parties would have been free to vary the non-cancellation clause informally, by dropping the requirement of writing. The addition of the non-variation clause had the effect of entrenching both itself and the non-cancellation clause against oral variation. In order to be effective, therefore, a non-cancellation clause must be coupled with a non-variation clause. The standard wording today is thus: 'No variation or consensual cancellation of this contract shall be of any force or effect unless reduced to writing and signed by the parties.
A non-variation clause must be restrictively interpreted, because it curtails the parties' freedom of contract. Whether such clause protects itself against oral variation, is a question of interpretation in each case.

A non-variation clause prescribes formalities only for the variation of the contract. A variation is a bilateral, consensual act by which the parties change the terms of the contract. Any legal act that does not amount to a variation is unaffected by the non-variation clause. An informal cancellation of contract is valid, despite the presence of a non-variation clause, because cancellation extinguishes rather than varies the contract.

Waiver is the abandonment of a legal right by the right-holder with full knowledge of the existence of the right. Abandonment can take various forms, consensual, others unilateral. The following forms of waiver have been held not to constitute variations, and therefore do not fall foul of a non-variation clause:

- Waiver of an accrued right arising from breach of contract (for example, the right to cancel the contract, or to claim damages);
- The discharge of an accrued obligation to make a certain performance under a contract by the creditor's acceptance of a substituted performance (*datio in solumtum*), or by his or her realising the debtor from the obligation; and
- An agreement not to enforce a right accruing under the contract, at least for a limited period of time (*pactum de non petendo*); for example, a promise by a creditor not to cancel the contract if the debtor fails to perform its obligations on time.

Non-waiver clause

The drafters of contracts were quick to notice that waiver might afford a means of escape from the '*Shifren* straitjacket'. It is not standard practice to include in written contracts yet another clause – a non-waiver clause, which is to the effect that no latitude or indulgence shown or extension of time granted by the creditor on any particular occasion should be construed as a waiver of his or her right to insist upon strict compliance with the terms of contract, or of his or her remedies in respect of any prior or subsequent breach of the contract.

Such a non-waiver clause is valid and effective, but is strictly construed by the courts. Depending on its wording, it might also preclude any reliance on the doctrine of estoppel.

The parties to the agreement - BRIEF

Co-creditors and co-debtors

Simple joint liability

In this case each joint debtor is considered liable for his own proportionate share only.
That is the general rule, a contractual terms implied by law.

Thus when the parties have made no stipulations, several debtors are simply jointly liable, each for his own share only.

Joint and several liability

In our law, joint and several liability is normally acknowledged only if the parties have expressly contracted to be bound as debtors, liable both jointly and severally.
In this case, each of the joint (or solitary) debtors is liable for the full amount of the debt that is the creditor can hold any one of the debtors fully liable.

Joint (or common) liability

The debtors are jointly liable only, and the co-creditors may only claim performance jointly.

Third parties

Stipulations for the benefit of a third party (stipulatio alteri)

The promissory acts in his own name for the benefit of the third party.

The content and interpretation of the agreement (BRIEF)

The content of the contract in general

The terms of the contract may be divided into the following 3 kinds:
- The **essentialia** of a contract.
- The **naturalia** of a contract.
- The **incidentalia** of a contract.

The **essentialia** of a contract are positive provisions of law.

- They are those terms which the law requires as essential to place a contract in a certain category, for example a contract of sale, lease or insurance.
- Thus, the law provides that a contract can be a contract of sale only if the parties have agreed that a thing shall be delivered in exchange for a price.

The **naturalia** of a contract are positive provisions of law.

- These provisions may be changed by the parties, unless the law contains provisions to the contrary.
- If nothing is stipulated by the parties when concluding the agreement, the usual positive rules become operative.
- Examples of naturalia are the seller's guarantee against latent defects in the thing sold.

- In the case of **incidentalia** of a contract the law makes no positive provision.
- We are concerned with special arrangements made by the parties.
- Example of the seller's guarantee against the latent defect in the goods, the seller can sell the thing **voetstoots** in order to overcome that guarantee.

Terms and conditions

- The terms in a contract serve to determine the contents of the contract.
- A condition is a term which makes the enforceability or consequences of the contract dependant on the **occurrence** or **non-occurrence** of an uncertain future event.

TERMS:

Terms expressly inserted by the parties

There are **3** forms of **express** terms:

(1) The parties most commonly express their intention by stating the terms of their contract on written or oral words.
(2) The parties can also express their common intention when concluding a contract by one or other form of conduct such as silence, gestures, etc, without any words.
(3) In the so-called ticket cases certain terms are considered to be part of the contract because of the conduct of the parties.

Ticket cases – **NB** pink suede jacket and helicopter question!

- In certain contracts it is customary that a ticket is issued in order to serve as evidence of the existence of the contract.

- The question may then arise whether the person receiving the ticket is bound by the terms thus incorporated by reference.
- To determine this question, our courts, following the English decision, have laid down a **3**-fold test:

(1) Did the person who received the ticket know there was printing or writing on the ticket?

(2) Did he know that the writing or printing referred to terms of the contract?

    - If both these questions can be answered **affirmatively** the terms referred to form part of the contract.
    - But if either of them is answered in the **negative**, a further question is put.

(3) Did the party issuing the ticket take the steps which were reasonably necessary to bring the reference to the terms to the notice of the other party?

- Cases of this nature occur in regard to train tickets in particular.
- The same problem arises with regard to notice boards at parking garages and workshops containing contractual terms such as clauses excluding the liability of the garage or workshop owner.

Implied terms

Tacit terms (terms implied from the facts)

In order to create a contract the parties must make their wills clearly known.
However, once it has been established that a contract has come into being, a good deal of difficulty may arise in regard to the contents of the contract.
It is not necessary for the parties to make known all the contents of the contract.
Our courts hold the view that something which the parties regard as obvious may form part of the contract, even if they have said nothing about it and even if they have made no other signs or gestures relating to it.

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NB!!! Our courts usually use the so-called **hypothetical bystander test** to determine whether a tacit term can be implied in a contract.
"A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can be confidently said that if at the time the contract was being negotiated someone had said to the parties, what will happen in such a case, they would both have replied, of course, that would happen, obviously." Note that this test was expressly applied in the Van den Berg case but not directly in the Scholtz case.

Ito the Van den Berg case, A and B entered into an agreement for the sale of a farm and shares in a brick-producing factory on the farm.
At a later date the parties decided to cancel the agreement.
Thus the cancellation agreement was therefore the second agreement.
But A had already paid R10 000 which he sough to recover.
The second agreement did not provide for the return of that which had already been delivered.

Thus the issue in this case was whether a tacit term providing for the return of that which had already been delivered formed part of the contract.
It was held that such term could be read into the contract.
Our courts are slow to read such term into a contract, and will only do so when satisfied that the term falls within the intention of the parties, as appears from the express provisions of the contract and the surrounding circumstances.
The **court** then referred to the hypothetical bystander test.
In this case, had the parties contemplated cancellation in these circumstances, they would have provided for return of money already paid.
They are therefore deemed to have intended this term.

The facts of the Scholtz case were briefly as follows:
Buyer bought a bull from the seller for stud purposes.
However, it later became clear that the bull was infertile. The buyer then cancelled the contract of sale and tendered return of the bull against return of the purchase price. Such cancellation took place a year after the sale of the bull. The buyer further alleged that he was entitled to cancel since the seller guaranteed him the fertility of the bull.

According to the seller, the buyer's right to cancel had already prescribed at the time he attempted to cancel.
The buyer's action was based on the aedilitian remedy of actio redhibitoria and that it had already prescribed.
The **AD** held that the buyer did not rely on the redhibitoria (but on the contract) and therefore his claim had not prescribed.
Furthermore, the seller had tacitly guaranteed that the bull he sold was fertile.
The buyer therefore had brought the **actio empti** which had not prescribed.

The interpretation of contracts

- The primary rules of interpretation are always first applied.
- If an ambiguity remains, then the secondary rules are applied.
- A clause or a phrase is ambiguous if it is capable of having more than one meaning.
- If these rules do not clear up the ambiguity, then the tertiary rules of interpretation are applied as a last resort.

The parole evidence rule

- A dispute about the contents of the agreements arises only too often.
- To settle such dispute, the agreement must be interpreted in accordance with the rules set out above.
- However, where the contract is embodied in writing, whether writing is required by law or the parties themselves have stipulated writing, the question becomes even more difficult.

- Ito the parole evidence rule, the written documents is the **only** admissible evidence about its contents, which are the terms of the written agreement.
- Thus, there is no extrinsic evidence (or oral etc) allowed.

Terms which qualify the obligation

Alternative, facilitative and generic obligations

Fixed or determinable performance:

- It is not sufficient if A says to B: 'I promise to sell you sugar'. The performance is not fixed and is not even determinable.
- The performance must be fixed at the moment the contract is concluded; otherwise no contract arises from the agreement.

Performance capable of being fixed:

- In the case of a contract of sale, for example, the parties may agree that the thing is bought for a price to be fixed by a third party.

Alternative obligation:

- An alternative obligation is an obligation i.t.o. which the debtor is bound to deliver one of several specific things.
- The alternative performance must be specified individually and not as part of a species.
- For example, the debtor has to deliver one of 3 specific horses, brave moment, melody song or big Donald.
- Unless the parties have agreed otherwise, the debtor is entitled to choose the particular horse he wishes to deliver and, therefore, to determine the performance.

Facultative obligation:

- In the case of a facultative obligation there is only one performance, but the debtor may perform something else instead of what has been agreed upon.
- In such case the performance has already been fixed.
- For example, the debtor has to deliver the horse brave moment, but may deliver the horse big Donald if he wishes.

Generic obligation:

- In the case of the generic obligation the performance is described according to **genus**, nature or characteristics, for example 100 bags of mealies of a particular grade.

Obligations with divisible and indivisible performances

- **Two** factors, in particular, play a part in determining the question whether a performance is divisible or indivisible.

- **Firstly**, the nature of the performance and **secondly**, the intention of the parties.
- Performance may be indivisible because of its nature, such as the delivery of a horse or the building of a house.
- Performance may also be divisible, for example the delivery of wheat in 10 equal installments at so much per installment.
- The discharging of the obligation to deliver 2 horses is of a divisible nature, but where the parties had the 2 horses in mind as a pair, the discharging of the obligation to deliver the pair is an indivisible performance.

Obligations subject to time clauses

- Time clause can operate in 2 ways: **resolutively** or **suspensively**.
- If added **resolutively**, the obligation is of effect only until the time agreed upon, for example, I employ you for 1 month only.
- On expiration of the month the obligations dissolve.
- In the case of a **suspensive** term the effect of the obligation, that is the stage at which it becomes due, is postponed until an agreed time.
- For example, A sold his car to B today, but he will only deliver it the following month.

Obligations subject to conditions

Definition
'A term which qualifies a contractual obligation in such a manner as to make its operation and consequences dependant on whether an uncertain future even will happen or will not happen.'

Thus the full operation of the obligations, that is the question whether they are due and enforceable, is rendered dependant on an uncertain future event.

Eg: FOURIE CASE: O sold a piece of land to F situated next to a stream.
The contract was subject to the condition that 'there are pump rights from the stream'.
Neither of the parties knew whether such right existed or not.
F took occupation of the property and paid monthly installments until he realised that no pump rights existed, where after he stopped making payments.
O sued him for arrear payments and F counter-claimed for repayment of the installments he had already paid.
The court held that O could not claim the purchase price paid.
F was entitled to recover all installments he had already paid.

Suspensive and Resolutive conditions

- The **suspensive** condition suspends the full operation of the obligation(s) under the contract and renders it dependant on the uncertain future event.
- A **resolutive** condition renders the continued existence of the obligation or operation of the contract dependant on an uncertain future event.

Supposition, modus and guarantee

Supposition:

- Parties may, however, also arrange their relationship with reference to an uncertain event of the past or an uncertain position in the present.
- This situation is referred to as a contract subject to a supposition.
- In such a case there are no obligations subject to a condition: there are either no obligations whatsoever or there are wholly unconditional obligations, depending on the correctness of the supposition.

Modus:

- The modus or charge differs from a supposition.
- It is also a term of the agreement which charges the creditor to do or perform something in the future in order to keep the performance which the debtor performed.

The guarantee or warranty:

- It differs from a modus and a supposition.
- A's guarantee may relate to the past, present or future.
- A sells his building to B and warrants that it can be used as a funeral parlour.
- An obligation is created immediately and it will not avail A later to contend that ordinances and regulations prohibit such use.
- Initial impossibility or supervening impossibility of performance, even without fault, does not release A.
- Thus he remains liable for the warranty and undertook liability for his guarantee.

Performance

Tender:

- The manner of performance is determined by the contract itself, trade usage or general principles of the law.

An example of the latter is the law of property.

Delivery:

- A very important question bearing on the performance of a contract concerns when, where and how the goods must be delivered.

Payment:

- All payments under the contract must be made in cash, unless the parties stipulate otherwise, or unless there is a contrary commercial usage.
- A cheque is not a legal tender, unless it can be proved that the creditor has explicitly or tacitly agreed to accept a cheque, or unless payment by cheque has become a matter of usage.

What must be performed?

The performance which is in fact due must be rendered. If the debtor tenders anything else it is not due performance and may be refused by the creditor.

On the other hand, if the creditor accepts it, the debtor is conditionally released. This is known as in solutum datio.

A owes B R400 and offers him a horse. B need not accept the cow as discharge of the debt, but if he does, A is conditionally released. If the cow has a defect A can either rely on the original cause of action by claiming R400 or institute a claim for the defect in the cow.

In solutum datio must not be confused with novatio. The same applies to payment in full settlement. Assume that A owes B R2000. B sends A a letter of demand in which he claims this amount and A then sends B a cheque for R1600, expressly stating that he is offering this sum “in full and final settlement” of the debt of R2000. The courts usually infer from such a phrase that A is making an offer to B, that is an offer to pay R1600 in full settlement of his debt to B and B may therefore only accept the cheque subject to the condition which A has made. If B should deposit the cheque in his bank account and thereafter write to A stating that he has accepted the cheque as partial settlement only, he cannot enforce payment of the balance of R400.

The position is different where B demands that A pay him R2000 and A then sends B a cheque for R1000 with the statement: “I owe you only R1000, which I enclose herewith.” B can now safely accept the money and still hold A liable for the balance, since A has made no offer but has merely denied that he owes the sum of R2000.

IF ALL THE REQUIREMENTS FOR A VALID CONTRACT ARE COMPLIED WITH THEN THE CONTRACT CAN GO WRONG ONLY WITH A BREACH COMMITTED BY ONE OF THE PARTIES:

Breach of contract

(1) default by the debtor (mora **debitoris**) (**negative** malperformance)
(2) default by the creditor (mora **creditoris**) (**negative** malperformance)
(3) **positive** malperformance
(4) repudiation
(5) prevention of performance

A **debtor** may breach a contract in **4** of the **5** ways above:

(1) default by the debtor (mora debitoris)
(2) **positive** malperformance
(3) repudiation
(4) prevention of performance

A **creditor** may breach a contract in **3** of the **5** ways above:

(1) default by the creditor
(2) repudiation
(3) prevention of performance

Mora debitoris:

Mora debitoris is the culpable failure of a debtor to make timeous performance of a positive obligation that is due and enforceable and still capable of performance in spite of such failure.

Requirements
The following requirements must be met before the debtor can be said to be in *mora*:

- The debt must be due and enforceable;
- The time for performance must have been fixed, either in contract or by a subsequent demand for performance, and the debtor must have failed to perform timeously; and
- Such failure to perform on time must be due to the fault of the debtor.

Debt due and enforceable

A debt is **due and enforceable** when a creditor has a valid right to claim performance forthwith and the claim cannot be defeated by any valid defence. In the absence of agreement to the contrary, the general rule is that the creditor may demand performance immediately on conclusion of the contract, or, where that is not possible or practicable, as soon thereafter as may reasonably be expected in the circumstances.

Failure to perform timeously

Timeous performance presupposes certainty as to the time for performance. Thus although a debtor is liable to perform as soon as his or her debt has become due, failure to do so cannot constitute *mora* unless or until a definite time has been fixed for performance, and that time has arrived. The time for performance may be fixed by agreement in the contract itself, or unilaterally by a subsequent demand for performance. A distinction is accordingly drawn between two forms of *mora debitoris: mora ex re* and *mora ex persona.*

Mora ex re. Where the parties have expressly or impliedly stipulated a time for performance in their contract, a culpable failure by the debtor to perform on or before the due date automatically places him in *more (ex re),* without the need for any intervention by the credito (the day makes the demand on behalf of the man.) But for this result to follow, the stipulated time must be, not only certain to arrive, but also certain as to when it will arrive (for example, 1 January 2010). The fulfilment of a suspensive condition, or arrival of an uncertain day which was certain to arrive (for example, 'when X dies'), may render the debt due but cannot give rise to *mora* without subsequent demand by the creditor.
The time for performance is fixed by implication when it is clear from the contract itself, or from admissible evidence of the surrounding circumstances, that the intention of the parties was that performance should be made on or before a certain date.

Mora ex persona. Where no time for performance has been stipulated in the contract, expressly or by implication, mere delay by the debtor in performing his or her obligation cannot automatically result the debtor falling into *mora*, even thought the debt may be due and enforceable and the delay quite unreasonable; the creditor must place the debtor in *mora (ex persona)* by demanding that he or she perform on or before a definite date or time that is reasonable in the circumstances.
The demand (*interpellatio)* is usually made extra-judicially in a letter of demand, though an oral demand will suffice; it may, however, take the form of a judicial summons, but the creditor will have to bear the cost of the summons if the debtor duly performs. The creditor need not allow a reasonable period to elapse after the conclusion of the contract before demanding performance; provided the debt is due, if he or she fails to make the demand within the period of prescription, he or she will of

course lose the right, but apart from this, there is no principle in our law according to which a right may be lost through mere delay in enforcing it. After all, the debtor has no ground for complaint, since he or she may always perform his or her obligation without waiting for a demand to do so.

When the reasonableness of the time allowed for performance is in dispute, the onus rests on the debtor to show that it is unreasonable, unless the demand is coupled with a notice of rescission. What is reasonable depends on the circumstances of each case, and the court will have regard to all the relevant facts that bear on this matter. However, what is reasonable on the conclusion of the contract may well differ from what is reasonable at the time when the demand was made, and unfortunately, the case law is somewhat ambivalent of the question of the time at which the reasonableness of the period stipulated in the demand is to be judged. On the one hand, it is stated that, in determining the reasonableness of the time allowed, the court will only take cognisance of factors affecting the time of performance that were or ought reasonably to have been within the contemplation of the parties at the time of entry into the contract. Thus unforeseen and unforeseeable difficulties and impediments that arise subsequently, such as the loss of the title deed in *Nel v Cloete*, are disregarded. On the other hand, it is also said that the court should consider the position at the time of the demand; and it is clear that at least one factor arising after the conclusion of the contract is taken into account – namely the time lapse between entry into the contract and the making of the demand. The debtor, it is said, is not entitled to remain inactive after conclusion of the contract, on the assumption that if or when he or she is called upon to perform, he or she will still have the benefit of the full period that was reasonable for performance initially; the longer his or her delay, the more likely it is, in cases of doubt, that the court will declare the demand period to be reasonable.

Can a debtor ever fall into *mora* without there having been a fixed time for performance?

Contrary to what is stated above, it has been held in a series of cases commencing with *Federal Tobacco Works v Barron and Co* that if 'time is on the essence of the contract' (as to the meeting of this expression, see below), the debtor will automatically fall into *mora* if he or she fails to perform within a reasonable time, even though no definite time for performance was fixed in the contract or by a subsequent demand. Despite attempts to defend these judgements, the weight of opinion is against them and, indeed, it is difficult to see how they can be reconciled with the decisions of the Appellate Division in *Breytenbach v Van Wijk, Nel v Cloete* and *Ver Elst v Sabena Belgian World Airlines*. Although never expressly overruled, they must be considered to have been tactfully

rejected. In his minority judgement in *Nel*, the judge stated that the *Federal* line of cases would have to be reconsidered in the light of the apparently justified criticism levelled against them; and in *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration*, the decision in *Broderick Properties Ltd v Rood* was considered at length and expressly rejected.
The view of the judge that a debtor who repudiates the contract automatically falls into *more (ex re)* when the debt becomes due and enforceable, even though no time for performance was fixed in the contract of by subsequent demand, has not found favour with other writers or with the courts.

Fault
The delay must be due to the fault of the debtor or of persons for whom he or she is responsible. If such a person was in reasonable ignorance of the nature of the performance owed by him or her, or of the fact that it was due, there is no *mora.* The same is the case if the delay was caused by the creditor him or herself, or by circumstances beyond the control of the debtor, such as *vis maior, casus fortuitous* or the conduct of independent third persons. Impossibility of performance is thus an excusing factor, provided that it is temporary and not due to the fault of the debtor. Permanent supervening impossibility either discharges the contract or is an independent breach of contract, depending on the absence or presence of fault.
Of course, if the debtor has expressly or impliedly agreed to be reasonable for any delay, howsoever caused, and has thus guaranteed timeous performance, his or her lack of fault will not prevent him or her from falling into *mora.*
The onus is apparently on the debtor to show that the delay was not due to his or her fault.

Damages
Whether or not he or she eventually performs, the debtor is obliged to compensate the creditor in damages for any losses that the latter suffers in consequence of the delay. In the case of an obligation to pay a liquidated sum of money, interest is payable from the date of *mora,* apart from any other damage that the creditor might suffer. Unless otherwise laid down by agreement, Act of Parliament, trade custom or a court.

Rescission
Rescission (cancellation) of the contract is an extraordinary remedy that is available only in a limited number of circumstances.
Lex commissoria – is a term entitling the creditor to cancel in the event of *mora.* A restrictive rule was considered impractical in a modern commercial environment and, under the influence of English law.

The expression 'time is of the essence' is a vague one derived from English law, and has caused a great deal of confusion in our law; but ever since the seminal case of *Nel v Cloete:*

- The parties have expressly agreed (express *lex commissoria)* that, in the event of the debtor failing to perform timeously, the creditor will be entitled to rescind the contract;
- The parties have tacitly come to such an agreement (tacit *lex commissoria)*; or
- In the absence of such agreement, the creditor has made time of the essence by sending a debtor notice of rescission.

Express lex commissoria. Should the debtor fail to perform on or before the time stipulated in the contract, the creditor may forthwith cancel the contract by giving the debtor notice to that effect. An offer by the debtor to perform at that late stage cannot deprive the creditor of his or her right of rescission.
Although sometimes described as such, a *lex commissoria* is not a resolutive condition on the fulfilment of which the contract is automatically terminated. The creditor is not obliged to exercise his or her right to cancel; the creditor has an election whether to cancel, or to affirm the contract and insist on performance.

Tacit lex commissoria. Even if the parties have not inserted an express cancellation clause in their contract, time of the essence of the contract if their common intention was clearly that, in the event of *mora,* the creditor should have a right to resile from the agreement. Whether such a tacit term exists or not is a question of fact to be determined by a consideration of all the relevant and admissible evidence, the intention of the parties being decisive. The mere stipulation of a definite time for performance does not suffice to make time of the essence; but the absence of such a stipulation makes it very difficult to argue that the parties considered timeous performance so vital that delay would give the creditor a right of rescission.

Notice of rescission. Where time is not of the essence, in terms of the principles just discussed, our courts have ruled, following English law in this respect, that the creditor may make time of the essence by sending the debtor a notice of rescission. The expression is misleading, however, for the notice does not rescind the contract; it merely informs the debtor that the creditor reserves the right to rescind if the performance is not forthcoming by the date mentioned in the notice. If, on that date, the creditor acquires and exercises his or her right to rescind, the contract is

terminated only when the decision to rescind is communicated to the debtor. However, it appears that if the creditor indicates in the notice of rescission that the contract will automatically be rescinded on the specific date, should the debtor still be in default, no further notice is required to terminate the contract.

Mora Creditoris:

The creditor is obliged to lend his or her cooperation, and a culpable failure to do so timeously constitutes the form of breach known as ***mora creditoris.***

Requirements:

Martin Harris, the court held that, for mora creditoris to exist, it is necessary for the debtor to call upon or demand from the creditor the required cooperation. However, such action on the part of the debtor is not necessary where either the agreement or the creditor has prescribed a time for performance by the debtor and thus (by implication) a time for cooperation by the creditor.

Obligation to make performance:
The debtor must be under an obligation to make the performance to the creditor, but the debt need not be enforceable since *mora creditoris* can occur even in respect of a natural obligation.
Cooperation:
The cooperation of the creditor must be necessary for the proper performance by the debtor of his or her obligation.
Tender of performance:
Usually, the debtor must tender performance to the creditor. What constitutes a proper tender of performance depends on the nature and content of the obligation in question. In general, the debtor must take whatever steps towards performance that are possible without the creditor's cooperation, and thereafter call upon him or her to give the necessary cooperation.
Delay:
For *mora creditoris* to exist, the creditor must delay in accepting performance (for example, by not being present at the stipulated time to receive performance, or by refusing admission to the debtor when the debtor arrives, ready to perform). As in the case of *mora debitoris,* the idea of delay presupposes that the time for performance has been fixed. If no such time has been fixed, or the debtor wishes to discharge the debt before the time stipulated for performance (where he or she is entitled to do so), the debtor must notify the creditor of the time when he or she

wishes to perform, allowing the creditor a reasonable opportunity to prepare to receive the performance.

Fault:

The delay must be due to the fault of the creditor. If it is caused by *vis maior* or *casus fortuitous,* for example, *mora creditoris* is excluded.

Consequences:

Cancellation:

The debtor may cancel the contract in exactly the same circumstances as those in which the creditor may cancel for *mora debitoris* – namely, when time is of the essence of the contract in terms of the agreement itself (that is, where the agreement contains an express or implied cancellation clause, or *lex commissoria*), or where it has subsequently been made of the essence by means of a notice of rescission, with which the creditor has failed to comply.

Damages:

Whether he or she elects to cancel or affirm the contract, the debtor is entitled to damages for any loss that he or she has suffered as a result of the *mora.* These will take the form of costs wasted in having to re-transport the goods from the agreed place of delivery or feeding the animals.

Specific performance:

If the debtor elects to abide by the contract, he or she may in suitable circumstances obtain an order of specific performance compelling the creditor to cooperate.

Counter-performance:

In the case of reciprocal contract, the creditor's delay in receiving the debtor's performance clearly does not relieve him or her of the duty to make his or her own counter-performance. Thus, it may be tactically wise for the debtor, when the creditor proves uncooperative in receiving his or her performance, to sue the creditor for counter-performance. Faced with the prospect of being compelled to perform on his or her side, the creditor is likely then to accept the debtor's performance.

Care of article and supervening impossibility of performance:

Mora creditoris alleviates the duty of a debtor to take care of an article that he or she has to deliver. Usually, the debtor is liable for any damage caused to the article by his or her negligence; once *mora creditoris* intervenes, however, the debtor's responsibility is limited to *dolus* (intent) and gross negligence.

Effect on security:
Mora creditoris releases sureties. Whether the debtor remains liable to pay interest on money owed, or other compensation for the use of a thing, is also unclear, but it seems likely that he or she will be liable so to pay only if he she continues to derive benefit from the use of the money or thing.

Discharge of debt:
Unless he or she validly cancels the contract or obtains an order compelling the creditor to cooperate, it is not clear how the debtor can discharge the debt without having to wait until the period of prescription has run or until performance has become impossible.

Positive malperformance:

Whereas *mora* in either form relates to the time of performance of the contractual obligation, **positive malperfomance** relates to the content of the performance made. It may take either of two forms, depending on whether the duty in question is positive or negative.

- Where the duty is to do with something, positive malperformance occurs when the debtor duly performs, but in an incomplete or defective manner. For example, a dealer delivers goods of the incorrect quality or quantity; a building contractor deviates from the plans and specifications; a university lecturer is regularly late in delivering his or her lectures.
- *P*ositive malperformance also occurs when the debtor does the act that he or she is bound to refrain from doing. For example, a lessee sublets the property or hangs washing from the windows in contravention of a term in the lease; the former employee takes employment with a competitor in breach of an agreement in restraint of trade; a student behaves in a manner that brings his or her university into disrepute.

Fault
It is unclear whether or not fault is an element of positive malperformance. By their silence on the point, most cases and writers create the impression that fault is not required, but this tacit assumption of strict liability is challenged in *LAWSA.* There it is pointed out that the debtor can avoid liability by showing that the malperformance was cause by factors beyond his or her control and for which he or she was not to blame (for example, the singing artist may show that a poor performance

was due to an unexpected cold); and that, where the debtor has to deliver or re-deliver a thing, he or she is liable for damage to the thing only if it was caused through his or her fault.

Remedies

1. **Rescission**
   If there is a cancellation clause (*lex commissoria)* in the contract, entitling the creditor to cancel for the particular type of malperfomance that has occurred, he or she may of course do so, even if the breach is not a serious or material one. Where, as is often the case, such a clause requires the creditor to give the debtor notice of intention to rescind should the breach not be rectified within a specific period, the creditor may rescind the contract only if such notice has been given and the debtor remains in default on expiry of the relevant period.
2. **Remedies aimed at fulfilment of the contract**
   If the creditor abides by the contract, either because the breach is not sufficiently serious to merit rescission, or simply because he or she prefers not to rescind, the following choice of remedies is available:
   - The creditor may accept the defective or incomplete performance as partial performance of the contractual obligation, and claim as fulfilment of the contract damages that are the difference in value between proper performance and the performance actually rendered; or
   - The creditor may reject the defective performance and demand either specific performance or damages in lieu of performance.

The damages that are awarded in lieu of or to complete the performance are known as **surrogate damages** to distinguish them from the damages awarded in respect of other (extrinsic) losses arising out of the breach (**consequential damages**). But surrogate damages are governed by the same principles that apply to the assessment of damages generally; in particular, the creditor will have to show that he or she has suffered a loss by not receiving proper performance, for our does not recognise a claim for the objective value of the performance per se.

Repudiation:

A party to a contract commits the breach of **repudiation** when, by words or conduct, and without lawful excuse, he or she manifests an unequivocal intention no longer to be bound by the contract or by any obligation forming part of the contract.
The intention to repudiate is judged objectively, the test being whether the party accused of repudiation has acted in such a manner as to lead a reasonable person to believe that he or she does not intend to fulfil, or completely fulfil, his or her part of the contract. An intention to terminate the contract is not required, nor is *mala fides* or fault, though these elements will often be present. If a part misunderstands the true content, meaning or effect of a contract, and in good faith disputes his or her obligations under the contract, his or her conduct will constitute a repudiation of the agreement if it satisfies the test stated above.
It follows that an unjust attempt to cancel a contract amounts to repudiation.
Repudiation is quite unlike the forms of breach discussed thus far, in that it may occur before the time stipulated for performance, in which case it is known as **anticipatory breach** of contract. The breach is anticipatory not only in the sense that is predates the time for performance but also in that it anticipates or predicts some other form of breach. A party who indicates in advance of the due date that he or she will not make or accept the stipulated performance, or that performance will be late, defective or incomplete, thereby gives notice that he or she will later commit *mora debitoris, mora creditoris* or positive malperformance, as the case may be.

Conflicting approaches to repudiation in modern law

According to the traditional approach, which still regards the act of repudiation as being analogous to an offer to rescind, the breach is full constituted or completed only when the repudiation is accepted by the innocent party; and if rejected the repudiation is a nullity with no legal effect at all. This approach is quite unacceptable. It is illogical, since if repudiation entailed the acceptance of an offer to rescind, the agreement would be terminated by mutual consent, and no breach would remain on which to base a claim for damages.
More acceptable, is the alternative approach according to which the act of repudiation per se constitutes the breach, being a violation of a fundamental obligation, imposed *ex lege*, to respect and honour the agreement. The so-called acceptance of the repudiation is then no more than an ordinary election to rescind where the repudiation is sufficiently serious to justify that remedy.

Effect of repudiation

Repudiation of a substantial part of the contract presents the innocent party with a choice of either, accepting the repudiation, thereby terminating the contract, or rejecting it, and keeping the contract alive. It is now accepted that this choice is the ordinary election to rescind or affirm the contract that faces the innocent party in all serious cases of breach.

Rescission of the contract (acceptance of the repudiation)

The repudiation must, as in all cases of breach, be a sufficiently serious nature to merit rescission. A repudiation of the entire contract will always entitle the innocent party to rescind. The law used to be, that the repudiation had to be of a substantial part of the contract, and indeed, on the traditional approach, a repudiation of a minor part of the contract was not a breach at all. It is not established law that the right to rescind depends on the nature and gravity of the non-performance or malperformance portended (threatened) by the repudiation. If that breach were to materialise and it would merit rescission of the contract, the innocent party may forthwith rescind on account of repudiation.
The guilty party cannot have it both ways; having repudiated the contract he or she may not seek refuge in one of its terms.
When the innocent party has the right to rescind and elects to exercise it, by accepting the repudiation, the contract comes to an end upon communication of this decision to the other party, and the usual consequences of rescission ensue.
Thus, for example, any performance already made in terms of the contract must be restored. Furthermore, the rescinding party is entitled to recover damages, which in the case of anticipatory breach are assessed in relation to the date of performance rather than the date of repudiation, but subject to the usual rule requiring the innocent party to take reasonable steps to mitigate his or her loss.
Thus, in a rising market, for example, a disappointed purchaser would ordinarily be expected to buy in expeditiously from an alternative source so as to limit his or her loss. Where no date for performance is fixed by the contract, the damages are assessed in relation to the date of acceptance of the repudiation rather than the date of repudiation itself – a rule that works to the advantage of the innocent party in a falling market.

Affirmation of the contract (rejection of the repudiation)

Subject to what is said below, the innocent party is not obliged to accept the repudiation; if he or she prefers, the innocent party may ignore or reject it and hold the other party to the agreement. In that event, the traditional view is that the relationship between the parties continues exactly as if no repudiation ha even occurred; the repudiation; being ‘a

thing writ in water', simply falls away and is as much a legal nullity as any other rejected offer. In other words, unlike other forms of breach, repudiation gives rise exclusively to rescissionary remedies; if the repudiation is rejected, it cannot found an immediate claim for specific performance damages.

Prevention of performance

Where performance on either side becomes impossible after the conclusion of the contract owing to the fault of either the debtor or creditor, the contract is not terminated, but the party who rendered performance impossible is guilty of a breach of contract known as **prevention of performance.**
Performance may be rendered impossible not only on or after the date of performance, but even long before such time, in which case the innocent party need not wait until the in-evitable non-performance on the due date before invoking the appropriate remedies; he or she may take action immediately. Like repudiation, therefore, prevention of performance may constitute a form of anticipatory breach of contract.

Fault
Fault is, of course, an essential element of the breach, since in its absence supervening impossibility will terminate the contract. Although Roman and Roman-Dutch law required various degrees of fault in respect of contracts revolving a duty to deliver or to re-deliver an article in one's custody, it seems in modern law there is only one standard of fault – namely, the care that could be expected from an ordinary, reasonable person in the circumstances. The onus apparently rests on the debtor in all cases to prove that his or her inability to perform is not due to his or her fault.

Remedies
The remedies available to the innocent party follow the usual patterns for breach, except that specific performance is of course excluded. On the assumption that the inability to perform is total, the breach will always be sufficiently serious to merit rescission. Thus, where the debtor is to blame for his or her inability to perform, the creditor may either:

- Cancel the contract, recover any performance already made on his or her side, and claim damages in respect of losses suffered due to non-fulfilment of the contract, such as wasted expenses and loss of profit; or

- Abide by the contract, perform his or her side of the agreement and claim the damages in lieu of performance from the debtor.

If it is the creditor who has rendered performance by the debtor impossible, the latter may either:

- Cancel the contract, restore any performance already made by the creditor, and claim damages for non-fulfilment of the contract; or
- Abide by the contract, and claim counter-performance from the creditor, subject to a reduction of the claim by the amount that he or she saves by not having to perform on his or her side.

Furthermore, whichever course the innocent party adopts, he or she may also recover damages in respect of any consequential loss that might have been suffered.

Partial impossibility

Where performance is rendered only partially impossible through the fault of the debtor, it seems that that the position of the creditor depends, in the first instance, on the materiality of the breach. If the impossibility attaches only to a minor, relatively insignificant aspect of the performance, so that substantial performance remains possible, the contract as a whole may not be rescinded and the only relief available to the creditor is a reduction in his or her counter-performance, where practicable, or a claim for damages in lieu of the missing part of the debtors performance.

Temporary impossibility

A debtor who culpably prevents him or herself from performing on time lapses into *mora* when the time for performance arrives, provided that performance at al later stage remains possible. If performance is no longer possible at all, or if the nature of the obligation is such that late performance is worthless and thus tantamount to no performance, the impossibility is permanent and the form of breach is prevention of performance.

What is the position if it is clear well in advance of the time for performance that, due to the fault of either party, the debtor will not be able to perform on time? It is submitted that the innocent party need not wait for *mora (debitoris* or *creditoris,* as the case may be) to arise, as is inevitably will, before taking appropriate action: the breach – prevention of timeous performance – has already been committed *in anticipando* and thus, if time is of the essence of the contract, he or she may cancel the contract forthwith.

REMEDIES FOR BREACH:

Remedies on the ground of breach of contract

Every contract is aimed at full performance by the parties.
Full performance has been rendered by both parties. This brings the contract to its natural end. Some provisions of the contract may remain alive for a period afterwards, such a contractual guarantees or warranties, but even those will usually terminate after a specified period of time. In the case of a longer term relational contracts, such as leases or employment, the contract will usually make provision for the contract to run for a specific period of time or contain a mechanism for each party to bring the contract to an end.
The natural way for a contract to terminate is therefore by **full performance** on both sides or in accordance with the provisions regulating the life of the agreement. However, breach of the contract by one of the parties may interfere with its natural life and result in its early termination.
The parties may insert provisions into their contract that are designed to regulate the consequences of the breach of the agreement. Examples include:

- A cancellation clause (*lex commissoria*) giving a right to cancel even for a minor breach provided certain procedures are followed (usually, giving written notice of intention to cancel unless the default is cured within a certain number of days);
- A penalty clause, to obviate practical difficulties in proving damages;
- An acceleration clause, making the outstanding balance of the debt immediately due and payable;
- An interest clause, regulating the amount or rate of interest payable if the debtors defaults; and
- A restitution clause, regulating what has to be restored if the agreement is cancelled.

(*Lillicrap, Wassenaar & partners*)

Different types of remedy

There are three types of remedy available to an innocent party after a breach of contract has taken place.

1. *Remedies aimed at keeping the contract alive.* These remedies include:
    - The ***exceptio non adimpleti contractus*** in terms of which the innocent party is entitled to refuse to render his or her own performance until such time as the breaching party has performed in full;
    - A claim for **specific performance**, in terms of which the innocent party asks for a court order forcing the breaching party to render his or her own performance; and
    - An **interdict**, in terms of which the innocent party asks the court for an order to prevent a breach of contract that has not yet happened, but which is threatening or imminent. The interdict can be seen as a specific type of remedy to ensue specific performance, although specific performance may also be enforced by normal action procedures.
2. *Remedies aiming at cancelling the agreement.* In certain circumstances, the innocent party is entitled to the remedy of **cancellation,** in terms of which the agreement is summarily terminated.
3. *Remedies aimed at **compensating** the innocent party for loss or harm caused by the breach.* These remedies can be claimed in addition to any of the remedies mentioned above and include:
    - A claim for contractual **damages** or delictual damages (in certain circumstances, the innocent party has a choice of remedies where the breaching party's actions constitute a breach of contract and a delict – delictual damages are not awarded for breach of contract as such, but only if there was a delict); and
    - A claim for interest on amounts owing (although *mora* interest – interest for late payment – is a species of damages, it is usually calculated and claimed separately from other species of damages in the pleadings).

Contract or delict

A breach of contract constitutes an unlawful infringement of the other party's rights *that arise from the contract.* The conduct that constitutes the breach may simultaneously also constitute a delict – that is, it may infringe rights of the other party *that exist quite independently of the*

contract (for example, the right not to be unlawfully injured in one's body or property through the negligent conduct of another). This raises the question whether the injured party has a choice of remedies as far as the patrimonial loss ic concerned – that is, whether he or she can choose to base the claim for damages either of the breach of contract, or on the delict that has been committed.

In *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd,* the court held that it was not desirable as a matter of policy to extend the Aquilian action to a breach of contractual duty to perform professional work with due diligence where the breach was caused pure economic loss. The Supreme Court of Appeal confirmed this decision in *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* and elaborated on the underlying principle as follows:
The point underlying the decision in Lillicrap was that the existence of a contractual relationship enables the parties to regulate their relationship themselves, including provisions as to their respective remedies. There is thus no policy imperative for the law to superimpose a further remedy.

Remedies aimed at keeping the contract alive

A party is entitled to have his or her own contract enforced according to its terms. There are two remedies aimed at the enforcement of the agreement: the *exception non adimpleti contractus* and an order to specific performance. The interdict is a specific form of the order for specific performance. It is a remedy that can be claimed speedily through application procedure to prevent a breach of contract.

The instant appeal concerned the right of the court to order specific performance of a contract for personal services.

Santos v Ingesund: Ingesund, a soccer coach, had entered into a contract with Santos, the appellant club. The contract provided that a breach by either of the parties would entitle the other either to cancel the contract and claim damages, or to claim specific performance.

Before the expiry of his contract, Igesund was made a more lucrative offer by Ajax Cape Town, the second respondent, and proceeded to give Santos notice of termination. Santos elected to enforce the contract and sought

- a declarator that the contract was binding on the parties;
- an order compelling Igesund to continue serving as Santos head coach;
- an order restraining Ajax from taking any action designed to induce Igesund to breach the contract.

The court deemed it clear that Igesund's principal reason for leaving Santos was that he had secured a better contract. This was relevant because there is an important distinction between a wrongfully dismissed employee and one who resiles unlawfully from his contract of employment. Igesund, furthermore, was no ordinary servant of the type in respect of whom the English courts refuse to order specific performance; he was a party contracting on equal terms with his employer and able to command a high sum of money in doing so. The court was also not being asked to order specific performance against an employer, but to declare that a contract was binding and to allow Santos to proceed to enforce its contract against an unwilling employee who wished to earn more money elsewhere.

It is generally accepted that it is an injured plaintiff's right to elect whether to hold a defendant to his contract or to claim damages for breach. Igesund had no right to prescribe how Santos would make the election provided by law. The English common law regards specific performance as supplementary to the remedy of damages; it is never granted where damages provide adequate relief. This rule is based on public policy and the sense that it is improper to make a person serve another against his will. South African law, in contrast, regards specific performance as a primary remedy, not a supplementary one.

While Igesund might not want to go back to coach Santos, an order of specific performance would not amount to compelling him to do something against his will. The fact that relations between Santos and Igesund had soured did not detract from the basic fact that Igesund had chosen to break the contract. He had thereby brought all subsequent unpleasantness between him and Santos upon himself.

There was no inequity, the court held, in obliging Igesund to adhere to his contract. Only Santos, which had chosen to take the risk of bringing an application for an order of specific performance, would be prejudiced if Igesund did not perform properly. In that event, the club had several remedies at hand, the most obvious of which was to stop paying him.

As to the view that it would not be possible to determine whether Igesund was functioning optimally, the court found that it had a discretion and could refuse specific performance only if it would operate "unreasonably hardly on the defendant, or where the agreement giving rise to the claim [was] unreasonable, or where the decree would produce injustice, or would be inequitable under all the circumstances." Santos could not be denied its ordinary remedy simply because of the possibility that Igesund might not perform properly, which was a factual issue that would arise only in the future.

It was clear to the court, from *Brisley,* that courts should be slow in striking down contracts or in declining to enforce them, and should, in

specific-performance situations, refuse performance only where a recognised hardship to the defaulting party has been proved. Practical considerations, such as the impossibility of measuring Igesund's performance, did not meet the proper test.

The court held that the court *a quo* had failed to apply the principle of election and the primary right to specific performance. It also had not appreciated the import of the remark in *Brisley* in favour of upholding contracts as opposed to striking them down. These failures amounted to misdirections and an approach on the wrong principles.

As to the relief sought against Ajax, the court found nothing to prove that it had induced Igesund to break his contract. The fact that Ajax had made an offer did not in itself prove an inducement. The court *a quo* therefore had quite correctly refused to make an order against Ajax.

The appeal against Igesund, accordingly, had to succeed, and that against Ajax to fail. There existed a binding agreement between Santos and Igesund, who would have to continue serving as head coach of Santos as dictated by the agreement. The decision by the single judge in *Santos v Igesund*, was thus reversed in part and confirmed in part.

1. Exceptio non adimpleti contractus:

The *exceptio non adimpleti contractus* is a defence that can be raised in the case of a reciprocal contract, where the performances due on either side are promised in exchange for one another. It is a remedy that permits a party to withhold his or her own performance, and to ward off a claim for such performance, until such time as the other party has either performed or tendered proper performance of his or her own obligations under the contract. In a sense, therefore, the *exception* is aimed at securing performance from the other party.

Requirements for the *exceptio non adimpleti contractus*

1. *Reciprocity of obligations. BK Tooling,* the Appellate Division stated that **reciprocal obligations** are obligations that have been created in exchange for each other. A contract that contains reciprocal obligations is also called a reciprocal contract. The distinguishing factor of a reciprocal contract therefore, is that it is essentially aimed at accomplishing an exchange of performances.
   In order to determine whether an obligation is reciprocal or not, the (express or tacit) intention of the parties must be determined by interpreting the agreement. Whether obligations are reciprocal

or not depends upon the intention of the parties, as reflected in the terms of the contract.

Reciprocal contracts are subject to the **principle of reciprocity.** Party A is not entitled to claim performance of a reciprocal obligation from party B where party A has to perform his or her obligation first of simultaneously, unless A has already performed or is tendering performance of his or her obligation. This also means that party B is entitled to withhold his or her performance until the counterparty has performed in full or tenders full performance.

2. *Sequence of performances*. The general rule is that parties must perform (simultaneously) unless (a) the parties have agreed otherwise, or (b) the *naturalia* of the contract in question dictate otherwise. The following provide examples where the *naturalia:*
    - *Lease:* The landlord must perform first by providing the use and enjoyment of the property to the lessee. Payment of the rent is only owed at the end of the month or year.
    - *Employment:* The employee must perform first. The employer is only obliged to pay the salary or wages at the end of the period.
    - *Building contracts:* the building contractor must perform first.

The parties are however free to change the sequence of performance as determined by the *naturalia* in their agreement. The sequence of performance will therefore firstly be determined by the intention of the parties and secondly by the *naturalia* of the contract if there is not specific agreement. The intention of the parties is determined by the interpretation of their agreement.

The interpretation of the agreement is supported by two presumptions:

- It is presumed that interdependent obligations are reciprocal unless there is evidence to the contrary.
- There is a presumption that in any reciprocal contract the common intention is that neither party shall be entitled to enforce performance unless that party has performed or is ready to perform – that is, that performance should take place simultaneously.

If, at the time of action, the plaintiff's duty to perform is not yet due and enforceable, the defendant cannot raise the *exceptio non adimpleti contractus* against the plaintiff. For example, in the case of a *cash sale*, the buyer and seller must perform simultaneously and if the buyer should institute action for delivery of the thing which he or she of the

thing which he or she has bought without tendering payment, the seller can raise the *exceptio non adimpleti contractus.*
In the case of a *credit sale,* however (that is, where payment by the buyer has been deferred to some future date), the *exceptio* cannot be raised against the buyer's claim for delivery of the thing which he or she has bought, since payment is not yet due.

3. *Incomplete performance.* A defendant can rely on the *exceptio non adimpleti contractus* not only where the other party has failed to perform all (*mora debitoris*), but also in cases where the other party has failed to perform properly, or in full (positive malperformance). The defective or incomplete performance need not be so serious as to justify a cancellation of the contract; the innocent party is permitted to withhold his or her own performance and to raise the *exception* even where the defect or shortfall in the performance is relatively minor, provided only that it is not so trivial as to fall within the principle *de minimis lex non curat.*

Factors affecting the application of the exceptio

Acceptance of part-performance. The *exceptio non adimpleti contractus* is a remedy aimed at ensuring full performance by the innocent party – that is, it is aimed at keeping the contract intact. Where the innocent party has received **part-performance** or **defective performance** and has started using the performance, even though it is aware of the defective performance, it is a strong indication that the party has elected to keep the contract alive. Such a party who has elected to keep the contract intact cannot thereafter cancel the contract, unless there is a further material breach of the contract. That party is therefore restricted to relying on the remedies aimed at fulfilment and damages. It is also entitled to raise the *exceptio non adimpleti contractus* as a defence.

Defective performance and cancellation of agreement. BK Tooling case, the Appellate Division stated that one must carefully distinguish between circumstances where the contract is cancelled due to a breach, and situations where the contract is kept alive and the *exceptio non adimpleti contractus* is raised to fend off any claim for performance. In the case where the contract is cancelled for material breach, the *exceptio* cannot be raised as a defence, as it is aimed at fulfilment of the contract. Where the contract has been cancelled, a claim performance will be resisted not with the *exceptio,* but with the defence that, since the contract has been terminated, the performance is no longer owed.
Where the contract is cancelled, the obligations to perform are terminated and both parties are obliged to return any performance received. These obligations are contractual in nature and do not arise from unjustified enrichment.

It may not be possible for a party to return the performance received. Where the contract has been lawfully cancelled, the innocent party who has received some value from the cancelled contract, then becomes liable to the party in breach on the grounds of unjustified enrichment. It can be said that, after cancellation, the innocent party has become enriched without a proper underlying cause and he or she therefore becomes liable to the other party to the extent that he or she remains enriched at that time.

Courts' equitable discretion: reduced contract price

Where a party who has to perform first, has performed only part of its obligations or has rendered defective performance, that party is in principle not entitled to claim counter-performance until such time as he or she has performed in full. In practice, the innocent party often accepts part-performance and starts utilising the performance. This sometimes leaves the party in breach in an invidious position in that it may be impractical or impossible for the breaching party to make full performance, but any claim for counter-performance can be defended by the other party relying on the *exceptio.*

In cases where the contract remains intact, the Appellant Division held that courts have an **equitable discretion** to award a reduced contract price, depending on the nature of the defect and the cost of repair, replacement or substitute performance.

This remedy is contractual in nature and the price reduction is calculated on the basis of the contract price. This must be distinguished from the enrichment action which is not calculated on the basis of the contract price, but rather on the subjective enrichment and impoverishment of the parties respectively. The onus to prove the amount of the reduction is on the party in breach claiming the reduced contract price.

In the *BK Tooling* case, the one party had to manufacture certain moulds complying with very strict specifications. The moulds were used in the manufacturing process of the other party. After delivery of the moulds, it was discovered by the other party that the moulds did not comply with the specifications. It then had the moulds modified by a third party. This, of course, made it impossible for the original party to rectify the defect in performance. The original party's subsequent claim for payment was met by the *exceptio non adimpleti contractus.* The innocent party had clearly accepted the defective performance and started using it, but without paying for the work done. The court held that under these circumstances, the party in breach was entitled to a reduce contract price, the cost of remedying the defects constituting and equitable reduction in the circumstances.

Scope of the *exceptio*

The **right to withhold performance** in terms of the principle of reciprocity is a temporary defence aimed at obtaining full and proper performance before being obliged to render counter-performance. The party relying on this right must therefore allow the party in breach an opportunity to remedy the defect. The remedial steps may involve completing the performance, providing a substitute performance or repairing work. It is up to the party in breach to decide how to effect proper and full performance in accordance with the provisions of the agreement. Once performance is properly completed, the right to withhold performance is extinguished.

2. Specific performance:

The parties to a contract are obliged to fulfil their contractual undertakings. It follows that each party is in principle entitled to insist upon proper and full performance by the other party, subject of course to demonstrating a willingness to perform his or her own reciprocal obligations. The primary remedy for breach of contract is thus specific performance. An **order of specific performance** is an order of court compelling a contracting party to make the very performance that the party agreed to make, in terms of the contract.

Scope

A claim for specific performance may take any one of the following three forms:

- A claim for the payment of a sum of money (*ad pecuniam solvendam*);
- A claim for performance of some positive act other than the payment of money; or
- A claim to enforce negative obligation (that the other party should refrain from doing something).

A claim for the payment of money due under the contract is in reality a claim for specific performance, although in practice it is often treated as a claim for damages.

A claim for specific enforcement of a negative contractual obligation takes the form of an interdict, and is most frequently encountered in cases involving the enforcement of agreements in restraint of trade.

Requirements for specific performance

The following two requirements for a claim of specific performance were laid down in *Farmers' Co-operative Society (Reg) v Berry.*

1. The plaintiff must have performed or be ready to carry out his or her own obligations – that is, must tender performance in terms of the principle of reciprocity; and
2. The defendant must be in a position to perform – that is, performance must be objectively and subjectively possible.

A third must be added that the order of specific performance must not be against public policy.

Discretion of the courts

Plaintiff is in principle entitled to a specific performance, it is now settled law that the courts have a general **equitable discretion** to refuse specific performance in appropriate cases. The courts tend to follow certain guidelines when deciding whether or not to order specific performance; and this has resulted in the recognition of a number of exceptional circumstances where specific performance is likely to be refused.

1. *Undue hardship*
2. *Personal services*

Execution of orders for specific performance

If a debtor fails to comply with an order of specific performance, there are various ways of enforcing the order. Where the order is to pay a sum of money, it can be enforced through the issue of s writ of execution, followed by the attachment and sale of property of the debtor. Where the order is to perform some act, or refrain from performing some act, a deliberate failure to comply with the order constitutes the offence of contempt of court, for which the debtor can be committed to prison. In appropriate cases, and without prejudice to its power to commit for contempt, the court may directly enforce the order by instructing a third party (usually an official) to make performance to the creditor.

Haynes v Kingwilliamstown Municipality held that an order of specific performance may be refused where the cost to the defendant in being compelled to perform is out of all proportion to the corresponding benefit to the plaintiff and the latter can equally well be compensated **by** an award of damages.

Cancellation:

Cancellation of a contract is an extraordinary remedy that is available to the innocent party only in exceptional circumstances. This is because it entails the drastic step of bringing the transaction to an abrupt and premature end, contrary to the original intentions of the parties. In the absence of a provision in the contract regulating the matter, a party will be entitled to cancel for breach only if the breach is sufficiently serious, or material.

1. **Materiality of the breach**
   Whether a particular breach is a **material breach** or sufficiently serious to justify cancellation will depend upon the particular circumstances and the type of breach in question.
2. **Cancellation clause**
   Parties will often insert in their contract a clause regulating the right of either party to cancel the agreement on account of a breach by the other party. Such a clause is known as a ***lex commissoria***, and it will usually prescribe a procedure that must be followed if the agreement is to be cancelled.

This so-called ***lex commissoria*** will usually describe the types of breach that will entitle a party to cancel the agreement. Thus, even a minor breach that would not justify cancellation at common law may afford a right to cancel, provided it falls within the scope of the cancellation clause.

The act of cancellation

Once a breach that justifies cancellation has occurred, the innocent party is faced with an **election**: either to affirm or to cancel the contract. An innocent party is, of course, never obliged to cancel, and he or she needs to make an election immediately – the innocent party has a reasonable period of time in which to do so. An election, once made, is final and irrevocable, unless the other party consents to its reversal. Thus, if the innocent party elects to uphold the contract, he or she cannot thereafter change his or her mind and cancel the contract, unless the other party commits a fresh breach justifying cancellation.
If the innocent party elects to cancel the contract, he or she must notify the other party of his or her decision, and the **notice of cancellation** must be clear and unequivocal. The cancellation takes effect only when it has been communicated to the party in breach; and it cannot be worded so as to take effect only from a future date. There are no formalities required for the act of cancellation; a simple oral or written notice will suffice, unless the contract itself or a specific statute stipulates otherwise. Nor is there any need for a court order, since the act of

cancellation is that of the innocent party rather than that of the court; but if the other party disputes the validity of the cancellation, it might be necessary to obtain a court order confirming that the contract has indeed been cancelled.
The notice of cancellation will usually state the grounds on which the contract is being cancelled. Provided that a good reason for cancellation does in fact exist, the cancellation will be effective despite the fact that the innocent party has relied upon a wrong reason. (*SWART*)

Loss of the right to cancel: elections and waiver
An election to affirm the contract necessarily entails the loss of the right to cancel. Thus, if the innocent party expressly or tactically manifests an intention to abide by the contract despite the breach, he or she waives the right to cancel on account of that particular breach. A tacit election not to cancel the contract may be inferred from the conduct of the innocent party. Even if the innocent party has no actual intention of waiving the right to cancel, if by words or conduct he or she creates in the mind of the other party the reasonable impression that he or she has elected to affirm the contract, the innocent party may be estopped from asserting the right to cancel.

The legal effects of cancellation
When the contract is cancelled, the primary obligations of the parties are extinguished. If the obligation is **invisible**, it is extinguished in its entirety. If the obligation is **divisible**, only those parts of the obligation that still need to be performed are terminated; the rest of the contract remains intact.

Restitution
Cancellation not only extinguishes obligations, it also creates new obligations, the duty on both parties to restore whatever performance has been received by that party (**restitution**).
The party claiming termination and restitution, must, in its pleadings, tender restitution of the performance he or she has received.
For instance, if restitution has become impossible due to the inherent defect of the thing itself, or due to *vis major* or due to the acts of an independent third party, the innocent party is still entitled to terminate the agreement and is excused from the duty to make restitution.

Damages:

The nature and purpose of damages

The aim is to place the innocent party in his or her fulfilment position – that is, position he or she would have occupied had there been no breach.

This entails a comparison between two financial positions or the plaintiff: the actual position in which the plaintiff now finds him or herself subsequent to the breach, and hypothetical position he or she would have occupied had there been no breach (**difference theory**).

Damages are measured according to the plaintiffs **positive** or **expectation interest.**

A person who has concluded a contract usually has an expectation that he or she will gain or profit from the transaction. In order to realise that profit, however, he or she must perform his or her side of the bargain, and in so performing or preparing to perform the party will often incur expenditure, relying on the fact that he or she has a binding contract and that in due course this expenditure will be recouped from the gross profits earned from the transaction.

Positive interest, aim to place the plaintiff in the position he or she would have occupied had the contract been properly and timeously fulfilled; negative interest damages are backward looking in that they aim at placing the plaintiff in the position he or she would have occupied had he or she not entered into the contract at all.

Applying the difference theory to a claim for damages for breach of contract will, as a simple matter of causation, produce a forward-looking result: but for the breach, the plaintiff would have been in the fulfilment position; and he or she would have made a profit on the transaction, his or her damages will include this expectation loss, in addition to any reliance losses he or she might have suffered as a result of the breach.

Requirements for a damage claim

A plaintiff who wishes to claim damages for breach of contract must prove the following:

- A breach of contract has been committed by the defendant;
- The plaintiff has suffered financial or patrimonial loss;
- There is a factual casual link between the breach and the loss; and
- As a matter of legal causation, the loss is not too remote a consequence of the breach.

Financial loss:

Actual loss; no nominal damages. The mere fact that the defendant has breached the contract does not entitle the plaintiff to claim damages; the plaintiff must prove that the breach has caused him actual loss or damage.
In the nature of things, great difficulty will sometimes be experienced in quantifying the loss. Provided it is clear that some loss has occurred, the fact that the extent of the loss cannot be precisely calculated or even reliably estimated will not prevent the court from making an award.

Financial or patrimonial loss. The loss must be financial or **patrimonial loss**. Refusing to follow the lead taken by courts in other jurisdictions, the Supreme Court of Appeal has made it clear that in our law, contractual damages may not be awarded for such thing as physical inconvenience, discomfort, mental stress, injured feelings or disappointment caused by a breach of contract.

Future loss: the once-and-for-all-rule. In terms of the **once-and-for-all-rule**, the plaintiff must claim all his or her damages in one action. The plaintiff cannot claim damages in a piecemeal fashion, as they occur. If not all the loss has been suffered at the time that the action is lodged, the plaintiff must include a claim for prospective losses in that action. If the plaintiff fails to do so, he or she will not be allowed to claim such losses in future. This rule is aimed at preventing a multiplicity of actions.

Application of the difference rule: a more concrete approach. The extent of the plaintiff's patrimonial or financial loss is determined by comparing the patrimonial position he or she presently occupies after the breach with the hypothetical patrimonial position he or she would have occupied had the contract been properly performed.
A person's **patrimony** or estate compromises all of his or her assets and liabilities. It includes incorporeal such as personal rights and obligations as well as corporeal property, but excludes personality rights. Thus, when a person enters into a contract, his or her personal right to a performance under that contract forms part of his or her patrimony.
The courts often use a more **concrete approach** in determining the quantum by focusing on the actual element of the patrimony that is affected.
Damage is calculated by comparing the value that the asset or obligation would have had if the contract had been properly performed, with its actual value after the breach.
For example, the amount of damages may be determined with reference to:

- The market value of the defective goods received as compared with the market value of the goods without the defect;
- The cost of repairing a defective performance or object to make it conform with the requirements of the contract;
- The amount of profit that a retailer could have made, but lost due to the breach;
- The cost of completing an incomplete performance
- The additional price that must be paid for replacement goods, where the defective goods are rejected or where the contract is cancelled; and
- Interest paid on an overdraft by the innocent party, where late payment is made.

Market value approach. In cases where the performance consists of marketable goods, the quantum of damages is often calculated with reference to the market value of the goods. In terms of the **market value approach**, the amount of damages is determined by the difference in the market value of the goods as received and the market value they would have had if the goods had conformed with the requirements of the contract.

Financial benefits flowing from the breach. Breach of contract has beneficial financial consequences for the plaintiff, quite apart from any losses that it might cause. When determining the overall financial position of the plaintiff after the breach, account should be taken not only of the losses arising from the breach, but also of these incidental gains, provided that they too are caused by the breach.

Causation

The financial loss or damage suffered by the plaintiff must have been caused by the breach.

The enquiry into causation in the law of contract is essentially the same as that in the law of delict.

International Shipping Co (Pty) Ltd v Bentley. The enquiry entails a two-stage process:

1. Firstly, one asks whether as a matter of fact the breach casually contributed to the loss in question; and
2. Secondly, if the first question yields a positive answer, one asks whether, as a matter of law, the casual connection between the breach and the loss is sufficiently close that the party in breach should be held responsible for it.

Factual causation
The test enquires whether the loss in question would have been suffered had the breach of contract not been committed. If, but for the breach, the loss would not have been suffered, the breach is a factual cause of the loss; conversely, if the loss would in any event have been suffered, the breach is not a factual cause of the loss. The innocent party needs to prove, on a balance of probabilities, that the loss would not have been suffered, but for the breach. If it fails to establish this casual link, that is the end of the enquiry and the damages claim must fail.

Legal causation
Once factual causation has been established, the focus of the enquiry shifts to legal causation, where the aim is to protect the party in breach from liability that is too wide ranging and unreasonable. Legal causation turns on the issue of remoteness – that is, whether the casual connection that exists between the breach and the loss is sufficiently close to justify the imposition of liability.
The approach to remoteness has traditionally been based on a distinction between general and specific damages. In *Thoroughbred Breeders' Association* expressed the view that the flexible test on the other fields might one day profitably be employed in the law of contract also.
In terms of the traditional approach, **general damages** flowing from the breach of contract are not too remote and hence are recoverable as a matter of course; **special damages,** on the other hand, are presumed to be too remote unless exceptional circumstances are present (*Holmdene Brickworks (Pty) Ltd.)*

General damages, then, are those that flow naturally and generally from the kind of breach in question. They are the sort of damages that might be expected in the ordinary course of things to result from the breach. As such, they would have been foreseeable to a reasonable person entering into the contact as a probable consequence of the breach in question.
The following examples server to illustrate the distinction between general and special damages:

- The loss of the value of an architect's time and effort in preparing plans flow naturally from a failure to transport those plans safely, but not the loss of the chance of winning a prize by entering the plans in a competition.
- The cost of demolishing and reconstructing a building flows naturally from a failure to deliver bricks and cement of the required quality, but not the loss of profit resulting from a delay in completing the building.

- The cost of repairing or replacing defective goods flows naturally from a breach of a contract for the delivery of new goods, but not a loss of production caused by the defect where is was not apparent that the goods would be used for manufacturing purposes.
- Loss of interest flows naturally from the failure to pay a money debt timeously.

Whether loss of profit constitutes general or special damages will depend on the particular circumstances of each case.
All damages that cannot be classified as general damages are special damages – that is, damages that would not normally be expected to flow from the type of breach in question, but which arise due to the special circumstances of the case. The general rule is that the party in breach cannot be held responsible for special damages. By the way of exception, however, the innocent party will be able to recover special damages, if he or she can prove that both the following requirements were met:

1. The damages were actually foreseen or reasonably foreseeable at the time of entry into the contract (the **contemplation principle**); and
2. The parties entered into the contract on the basis of their knowledge of the special circumstances, and thus can be taken to have agreed, expressly or tacitly, that there would be liability for damages arising from such special circumstances (the **convention principle**).

The convention principle: *Lavery & Co*. Today, there is general agreement that the principle is unrealistically strict in its insistence that an agreement must be shown before the breaching party can be held liable for the special damages.

The mitigation rule

In *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd,* the court authoritatively stated the **mitigation rule**: where a breach of contract has occurred, the innocent party cannot merely sit back and allow his or her losses to accumulate; the party must make reasonable positive steps to prevent the occurrence or accumulation of losses.
Should the innocent party fail to take such steps, the party in breach can raise the mitigation defence against a claim for damages by the innocent party.

Penalty clauses

- **Pre-estimate of damages.** To overcome the difficulty of establishing the quantum of loss that results from a breach, the parties will often stipulate that in the event of breach the guilty party will pay a pre-determined sum of money to the innocent party (or a sum that is easily determinable). This sum is intended as a rough estimate of the damages that the innocent party is likely to suffer in consequence of the breach.
- **Penalty clauses.** These clauses provide for the payment of a penalty in the event of breach. Their primary purpose is to serve not as a pre-estimate of the damages likely to arise from breach. This is evident from the fact that the stipulated penalty is often quite draconian in character, bearing no relation to the actual loss likely to be suffered. Such a penalty clause is inserted *in terrorem*, as a strong incentive to ensure that the parties comply with their contractual obligation.
- **Forfeiture clauses.** These clauses provide that, in the event of cancellation for breach, the party in breach forfeits the right to restitution of any performance already made – that is, the breaching party forfeits the right to the return of benefits already conferred on the innocent party under the contract (for example, a deposit paid under a lease agreement)

Interest

Interest that a creditor would have earned on an amount (had it been paid) is a loss that flows naturally from the breach and therefore constitutes damages that can be claimed.

1. At common law, ***mora* interest** on a debt becomes payable from the date that a **liquidated debt** falls due. Where no date for payment was agreed, payment becomes due on demand from the creditor. In claim for **unliquidated damages**, the debtor cannot be in *mora* until such time as the amount of damages has been fixed by court. Interest is therefore only payable from the date of judgement.
2. The Prescribed Rate of Interest Act now governs claims for the payment of interest. In terms of the Act, interest at the prescribed rate is payable on any debt that bears interest, unless the rate of interest is set in the contract or by a trade custom. The Act also provides an interest to run on unliquidated debts from the time of demand or summons, whichever is earlier. The amount on which

the interest is calculated is the amount as finally determined by court or in arbitration. The Act also provides for payment of *mora* interest on judgement debts, where such debts would ordinarily not be interest-bearing.

HOW ARE PERSONAL RIGHTS TRANSFERRED?

CESSION:

Cession is the act of transfer. Since there can be no physical delivery of an incorporeal, cession is effective by mere agreement.
Cession occurs when a creditor A (the **cedent**) transfers a personal right that she has against debtor B to a third person C (the **cessionary**). The right that is transferred might (but need not) be a contractual right. C steps into the shoes of A as the new creditor of B. Cession thus has both obligationary and proprietary consequences. On the one hand, it entails a substitution of creditors, and thus affects the obligation between the parties; on the other, it serves to transfer an asset from the estate of the cedent to the estate of the cessionary.

Nature of cession

A **personal right** is a claim to a performance owed under an obligation. The obligation might arise from the contract, but could arise from any other source of obligations, such as delict or unjustified enrichment. The personal rights in an estate might be even more valuable than the real rights.

The requirement for a valid cession

For a cession to take legal effect, certain requirements need to be met. These are discussed in more detail below and include the following:

- An entitlement by the cedent to dispose of the personal right;
- The capacity of the personal right to be ceded;
- A transfer agreement;
- Formalities;
- Legality; and
- The absence of prejudice to the debtor.

A valid cause is apparently not a requirement for validity, but its absence can give rise to a claim for unjust enrichment.

The consequences of cession

1. The first consequence if cession is that the cedent divested of the ceded right. The right is no longer an asset in his or her estate. Right cannot be attached by the cedent's creditors and if he or she should go insolvent, the right will not fall into the insolvent estate.
2. Right vests in the cessionary, it becomes an asset in the cessionary's estate.
3. Cessionary is substitute creditor, through cession, the cessionary steps into the shoes of the cedent as the new or substitute creditor.

4. Nemo plus iuris rule applies to the transfer of personal rights no less than to the transfer of real rights.
5. Performance by the debtor must be made to the cessionary. Since the cessionary is the new creditor, performance by the debtor must be made to the cessionary rather than to the cedent. Once the cession has taken place, performance to the cedent will not discharge the debt.
In order to protect the debtor, therefore, our law adopts the position that if the debtor has not been notified of the cession and in good faith makes a payment or other performance to the cedent, he or she is released from liability.

Security cession (cession *in securitatem debiti*)
A right (or some part of it) is transferred for the limited purpose of securing a debt owed by a cedent to the cessionary. The intention of the parties is that upon discharge of the secured debt, the cedent will regain full title to the right. Security cessions are very common and afford an important means of access to credit in the modern economy.

Fiduciary security cession (out-and-out security cession)
Parties who wish to employ this form of security cession should make their intention abundantly clear, failing which the courts will interpret their security cession as a pledge. The **fiduciary security cession** is an ordinary, out-and-out cession of a personal right as security for a debt, coupled with an agreement to re-cede the right when the debt is paid. Consider the following example: X wishes to borrow R8000 from Y. Y will lend the money only if X provides security for the repayment of the loan. X has a claim against Z in the amount of R10 000. X therefore cedes to Y as security for the loan the claim that he has against Z. The intention of the parties is that the claim against Z should be transferred outright to Y, who will become the creditor in place of X, just as in the case of an ordinary cession. If X then fails to repay the loan to Y, Y will be able to enforce the claim against Z and can use the proceeds to discharge X's loan obligation. The parties also agree, however, that is X does repay the loan; Y will transfer the claim against Z back to Y.

Pledge
In the case of a **pledge** of a corporeal thing, the pledgor retains ownership (bare *dominum*) of the property concerned, but surrenders possession of it to the pledge, who acquires a limited real right of security in the property. This real right endures only for so long as the property remains in the possession of the pledge. The pledge automatically ends when the principle debt is paid, because of the accessory nature of a pledge. If the pledgor fails to pay the principle debt, the pledge may sell

the property and use the proceeds of the sale to satisfy the debt. Any surplus must be paid to the pledgor.

HOW DOES A CONTRACT TERMINATE?
IE: HOW DO PERSONAL RIGHTS TERMINATE?

Obligations are terminated either by performance, by agreement, by operation of law or by the unilateral act of aggrieved party in the case of voidable contracts or after a breach of contract that is sufficiently serious to allow cancellation by the aggrieved party.

Termination by performance

1. **Required performance**
   Only full and proper performance, as agreed, will extinguish the obligation. If the creditor refuses improper or defective performance, he or she will not be in *mora creditoris.*
2. **Performance by a third party**
   For an obligation to terminate, the person who performs the obligation must be the person who agreed to perform. However, the obligation may also be extinguished where a third party performs with the intention of performing on behalf of the debtor. The creditor cannot refuse such a performance if he or she would not be prejudiced and if performance is effective. The creditor may refuse performance by a third party where the performance is of a personal nature.
3. **The person to whom the performance must be made**
   Performance should ordinarily be made to the creditor. The creditor may however, appoint another person to whom the debtor may perform. A third party who is entitled to receive performance, but (unlike an agent) is not authorised to claim performance, is called an *adjectus solutionis causa.* Normally, the debtor may still perform to the creditor, unless it was contractually agreed that the debtor would perform to the third party.
4. **Place of performance**
   Performance must be made at the place agreed by both parties. A tacit agreement will suffice. In the absence of such an express or tacit agreement, the court will consider circumstances such as usages, the place of contracting, the place where the goods are situated (in the case of a sale of goods), and the nature of performance, to determine the place of performance.

5. **Time of performance**
   The time for performance may also be agreed expressly or tacitly. In the absence of such agreement, the creditor may demand performance immediately, but the debtor must have a reasonable time in which to perform. The ordinary rules on *mora debitoris* as a form of breach apply.
6. **Performance as a bilateral act**
   Under South African law, performance is a bilateral act, which requires the cooperation and agreement of both the creditor and the debtor. Sometimes, it is said that the parties must enter into a debt-extinguishing agreement. Thus, if A sells a chair to B, it is not sufficient that A delivers the chair to B; the parties must further agree that A fulfils his obligation under the agreement of sale by such delivery.

Termination by agreement

1. **Release and waiver**
   A **release** is an express or tacit agreement that the debtor be freed from an obligation or obligations. It therefore has the effect that the debtor need not perform. The debtor may be released in whole or in part.
   The term **'waiver'** is often used synonymously with the concept of a release agreement. However, sometimes waiver is used to denote a unilateral act of abandoning a right or remedy that exists for the sole benefit of the party abandoning the right or remedy.
2. **Novation**
   A **novation** is an agreement to extinguish and replace one or more existing obligations with a new obligation. Accessory obligations to the original debt, such as a pledge or suretyship, are extinguished by an agreement to novate the debt.
   The parties may agree to replace the debtor with a third party, provided, of course, that the third party agrees to such novation. Replacement of a debtor by novation is called delegation.
3. **Compromise**
   Compromise is an agreement in terms of which parties settle a dispute or some uncertainty between themselves. New obligations are created in the process and any existing obligations are extinguished.

4. **Effluxion of time**
   If a contract fixes a specific period for its duration, it terminates automatically at the end of such period.
5. **Notice**
   A contract may also specifically provide for termination by notice. A continuous contract that does not provide for automatic termination thereof after a specific period, nor for a notice period, is normally terminable upon reasonable notice. Thus a lease contract that does not stipulate a lease period will be regarded as a lease for an indefinite period, terminable upon reasonable notice by either party.

<u>Termination by operation of law</u>

1. **Set-off**
   The following four requirements must be met for set-off to operate:
   1. The debts must exist *between the same two persons in the same capacities.* Thus, if A owes B R100, and B, as executor of X's estate owes A R100, set-off cannot occur, as B does not owe anything in his personal capacity.
   2. The debts must be of the *same kind or nature.* Thus, a money debt cannot be set off against a debt to deliver 50 sheep.
   3. Both debts must be *due and enforceable.* The debts must therefore not be subject to suspensive conditions or time clauses, or be subject to the *exception non adimpleti contractus.*
   4. Both debts must be *liquidated* – that is, be 'capable of easy and speedy proof'. A claim for damages is usually not liquidated. If set-off cannot operate because one debt is not liquidated, the creditor may claim it in reconvention, and request that judgement in convention (on the other party's debt) be postponed until judgment in reconvention.
2. **Merger**
   Merger occurs when one person becomes both creditor and debtor in respect of a certain debt. For example, A owes B R100. B dies and leaves her estate to A. A is now both the debtor and creditor in respect of the debt of R100, so that the debt is extinguished by merger.
3. **Supervening impossibility of performance**
   If a performance is objectively impossible at the time of conclusion of the contract, no obligation arises. If, after the conclusion of the contract, performance becomes objectively impossible without the

fault of the debtors as a result of an unavoidable and unforeseen event, the obligation to perform is also, as a general rule, extinguished. Impossibility that arises after conclusion of the contract is called **supervening impossibility of performance.**

Requirements for supervening impossibility of performance

1. The performance must be objectively impossible; and
2. The impossibility must be unavoidable by a reasonable person.

Effect of supervening impossibility of performance

Supervening impossibility of performance affects not only the obligation that has become impossible, but also any counter-obligations. Where impossibility of performance is only partial or temporary, the effect on the contract depends on the circumstances of the case.

4. **Prescription**
5. **Insolvency**
6. **Death**

CONTRACT LAW CASE SUMMARIES

Saambou- Nasionale Bouvereniging v Friedman

Facts

- Respondent handed a cheque drawn in favour of Appellant to W to buy shares in the Appellant for the respondent's wife.
- Cheque fell into the hands of an unknown person who, pretending to be the respondent, handed it to appellant as payment for shares which were issued to 3 persons who were complete strangers to respondent
- The respondent stopped the payment of the cheque and was sued on it by the appellant
- Respondents defence was that the appellant gave no value or valuable consideration in respect of the cheque and the respondent did not become a party to the cheque for any cause which could found an action on contract or agreement

Legal Question

- Was there a valid agreement between the respondent and the appellant to the effect that appellant could apply the cheque as payment for the shares issued to the 3 strangers?

Finding:

- No such agreement existed

Rationale

- Appellant contracted with the person who pretended to be the respondent and not with the respondent
- Respondent wasn't in fact involved in the matter, therefore, no agreement between the respondent and the appellant as to how the cheque was to be applied which meant that no valid primary agreement came into existence to provide the *iustu causa* required for a valid and enforceable contract

Note:

- There could not have been a contract between the parties no matter which theory regarding the basis of a contract is accepted

Vasco Dry Cleaners v Twycross

Facts

- Carides (VDC) sold business to Air Capricorn
- Ownership of machinery would only pass on payment of full purchase price
- AC later needed financial assistance to pay the balance of the purchase price and entered into an arrangement with Twycross, in terms of which Twycross paid off Carides and AC sold and delivered the machinery to Twycross
- Twycross then resold the machinery to AC but subject to the condition that ownership of the machinery would only pass to AC once Twycross was paid
- Before paying Twycross, AC was again in financial troubles and sold VDC plus the machinery to Butcher
- When negotiating this sale AC guaranteed that it was the owner of the machinery
- Butcher ran the business as VDC, AC subsequently failed to pay Twycross who instituted *rei vindication* against VDC to reclaim his machinery

Finding

- There had not been a true sale &resale of the machinery between Twycross and AC
- Twycross had lent the money to AC which lam was secured by a pledge if the machinery
- Ownership of the machinery had therefore not passed to Twycross who could not succeed with a *rei vindication*

Note

- The contract of sale& resale between Twycross and AC was not their true intention. Their true intention was to effect a pledge of the machinery
- To reach consensus it is essential that the parties actually intend to create an obligation
- Law looks at their true intention not their simulated intention

Bloom v The American Swiss Watch Company

Facts

- Bloom claimed a reward in terms of a notice published by ASW promising a reward to any one providing information which lead to the arrest of the thieves and recovery of jewelry stolen
- Bloom gave the information BEFORE he became aware of the notice

Finding and Rationale

- He therefore, did not furnish the information in response to the notice and could not therefore, be said to have accepted ASW's offer to pay a reward

- Thus, no contract came into being between Bloom and ASW and therefore, no basis on which he could claim the reward

Note

- Parties who agree must be aware of their agreement

National and Overseas Distributors Corporation (Pty) Ltd v Potato Board

Facts of the Case

- The Respondent [the potato Board] mistakenly accepted a tender of the Appellant for the erection of a Steel shed
- The respondent had expressed in a letter to the appellant that the appellant offer to erect the steel shed had been accepted
- This acceptance was a mistake as the Respondent had in fact intended to accept the tender of a third-party.

Legal Question

- Was the Mistake Material???

Finding and Rationale

- The mistake was material
- The court found that the appellant was led to reasonably believe that the respondent intended to contract with it.
- Even though the letter had incorrectly expressed the respondent's intention (so that there was Dissensus) the court found that a contract existed because the appellant's belief that its offer had been accepted was reasonable in the circumstances
- It related to the persons between whom obligations were to be created [content of the obligation]

Note

- This was not a case of mistaken as to identity as the Respondent [the Potato Board] did not mistake the Appellant for the 3rd party.

George v Fairmead (Pty) Ltd 1958 (2) SA 465 (AD)

Facts of the Case

- The Appellant argued that he had signed a hotel register whereas he had, In fact, signed a contract containing a term excluding the Respondent from liability for certain acts
- The Appellant was not aware of this term because he did not read the document before signing it.

Finding of the court

- The court found that the Appellant's mistake related to a term which he believed would not be in the contract.
- This mistake was material because it related to an aspect of performance.
- F was led to believe that the other party (G) agreed to a material term in a contract because G had signed the contract and F had believed that G had read the relevant term
- The contract was therefore valid

Allen v Sixteen Sterling Investments (Pty) Ltd 1974 (4) SA 164 (D

Facts of the Case

- The Plaintiff believed that he was purchasing the erf SHOWN to him by the seller's agent.
- The written contract which he signed indicated the correct erf which was a completely different property

Finding of the court (analysing the mistake)

- The mistake in this case related to performance and was thus, material

Du Toit v Atkinson's Motors 11985 (2) SA 889 (AD)

Facts of the Case

- A party (A) signed a contract without reading it since he believed that its terms coincided with the content of the other party's (B) advertisement.
- However - the contract contained a further material term of which A was unaware (Vis - a term excluding the Respondent from liability for misrepresentation.

Finding of the court

- The court found [once again] that the mistake related to an aspect of performance and was thus material.
- The court found (as the term was material) the contract to be void.
- The court found that B (in this case) had not been misled by A into believing that he (A) had agreed to the term because B had not drawn A's attention to that relevant material term.
- The court found (as the term was material) the contract to be void.

Sonap Petroleum (SA) (Pty) Ltd [formerly known as Sonarep (SA) (pty) (Ltd) v Pappadogianis

Facts of the Case

- The contract denier entered into a contract of lease with the contract enforcer for a period of 20 years
- The Lease was to start on a date to be specified in a certificate that the contract denier would issue at a later stage.
- The contract denier failed to issue the certificate for about 12 years
- Instead, the contract denier prepared an addendum which the contract enforcer signed
- In the addendum [signed by the contract enforcer] the lease was reduced to 15 years to
- The contract denier had misrepresented his intention with regard to the term of the lease.

Finding of the court

- The court found that although the Appellant signed the addendum, it (the addendum) clearly incorrectly expressed its (the Appellant's) intention as to a material term. [The material term being the period of lease which is an aspect of the performance] and its mistake was material.
- The court found that the Appellant was led to believe reasonably that the Respondent intended to contract with it.
- Even though the letter had incorrectly expressed the respondent's intention (so that there was Dissensus) the court found that a contract existed because the appellant's belief that its offer had been accepted was reasonable in the circumstances
- Thus the Court had found:
- That the contract enforcer knew that the contract denier was acting under a mistake with regard The term of the lease,
- That consequently the contract denier was not misled by the content of the signed addendum

Effect

- The court found that the addendum was thus void

Steyn v LSA Motors Ltd 1994 (1) SA 49 AD

Facts of the Case

- The respondent intended to make an offer can only a certain group of people, namely professional golfers.
- An advertising board, situated at one of the holes of that golf course offered a prize (A motor vehicle) to the golfer who achieved a hole in one at that hole.
- The advertising board did not state that the offer was extended to professional golfers only.
- The appellant, an amateur golfer achieved a hole in one at that hole and claimed the prize
- Argument of appellant: that the advertising board constituted an offer which was extended to all players and that therefore a contract had come into being when he obtained the hole in one

Finding of the court (In respect of Mistake)

- The court found that the Respondent's mistake related to the other party to a potential contract [In other words-the Respondent only intended that any possible contract that could arise would be between itself and a professional golfer]
- The court found that even if the appellant had been misled by the advertising board that a reasonable man would not have been misled in the circumstances.
- No contract came into being

Reasoning being:

- The rules (at that time) relating to amateur golfers specified that amateur golfers are only entitled to prizes up to a value of R 600.00
- A reasonable man would have known of this rule and would not have been misled in the circumstances

Effect

- The mistake was deemed to be material and the contract set aside

Dickson motors v Oberholzer

Facts

- O's son bought 2 cars on credit, Car A from Dickson motors and Car B from a 3rd party
- After exchanging car B for his fathers car the son disappeared, leaving unpaid balances on both cars
- DM obtained judgment against the son for the unpaid balance on car A and then had the car in O's possession attached to satisfy the debt
- This was done on the mistaken belief that the car in O's possession was car A but it was actually car B
- O paid the outstanding debt to DM to retain possession of the car, but he was under the mistaken belief that the car in his possession was car A
- Later, the car in O's possession was attached again, but this time by the 3rd party, correctly, who had sold the car to the son

- O now sued for the return of amount which he paid to DM

Appellate division

- O succeeded because the contract between O and DM is void on the ground of common mistake

Magwaza v Heenan

Facts

- M and H concluded a written contract of sale of immovable property in which the description of the property was so deficient that it didn't comply with the provisions of the Act 68 of 1957
- H claimed rectification of the contract

Appellate division

- Held that non compliance with the act resulted in the contract being void and therefore there was nothing to rectify

Crawley v Rex

Facts

- Shopkeeper advertised sale of tobacco at reduced price
- C bought half a KG and returned immediately to buy more
- Shopkeeper refused to sell to C again
- C refused to leave the shop and was arrested for remaining unlawfully on the premises

Legal question

- C argued that he had accepted the shopkeepers offer t sell tobacco and therefore a contract existed between C and shopkeeper

Finding

- Adverts are invitations to the public to do business and it is the client who makes an offer to purchase, which the shopkeeper can then accept or reject

Bird v Summerville and another

Facts

- B signed a written offer to sell his house to S
- S added the name of second respondent to the document and they both signed the document as purchasers

Finding

- AD held no contract came into existence as B's offer had been made to S only and could not be accepted by S together with somebody else

Note

- Generally an offer is directed at a definite person, but may also be directed at unidentified persons
- But if offer is addresses to a specific person it may only be accepted by the specific offeree(s)
- See Bloom case

Rex v Nel

"In contracts where there are mutual obligations notification of acceptance is necessary before the agreement becomes binding on the parties. But it is open to the parties to dispense with such notification in express terms, and not only that, but such dispensation may also be implied from the language used or from the nature of the contract"

- The information theory

Cape Explosive works v Lever brothers Ltd/ South African oil and Fat industries Ltd

Facts

- CEW is a manufacturer of glycerine
- Their place of business is in the Cape province
- They concluded 2 agreements for the purchase of glycerine- one with a company in the Transvaal and another with a company in the Natal

Legal question

- Where had the contracts been entered into?

Finding

- The contracts had been concluded where CEW's letter of acceptance were posted and not where they were read

Note

- Expedition theory applied to postal contracts rather than the information theory

Smieman v Volkerz

Facts

- S lived in Pretoria and V lived in Cape Town
- V orally granted S an option to buy V's shareholding
- The option was to be exercised by Feb 15th
- On Feb. 15th S asked his attorney's to exercise the option on his behalf
- Gelb (the attorney, in CT) phoned V's CT office but he was away. Gelb therefore, posted a letter to V saying that S chose to exercise the option. Both letters delivered after the 15th

Court held

- No contract had come into existence because the offer contained in the option had not been accepted timeously
- There was no indication that V has waived his right to be informed on or before the 15th that his offer had been accepted
- Such an indication would have existed if the offer had been made by post and not orally

Note

- Expedition theory will only be applied where an acceptance takes place by letter only if the offer had also been made by post or if the offeror had indicated in some or other way to the offeree to make use of the post
- This is also not an absolute rule. It could also be shown that the offeror did not intend the expedition theory, rather information theory, to be applied

Brand v Spies

Facts

- S granted B an option to buy farm orally
- S later repudiated the option. B sued S for damages on ground of breach of contract

Court held:

- No contract existed
- Contract of sale of land had to be in writing. For a contract to be in writing, both offer and acceptance had to be in writing
- No written offer had existed which could be accepted by B to bring about a written contract

Note

- The option itself does not equal a contract for sale of land therefore there is no need for it to be in writing
- An option involves 2 contracts/parts
  1. offer to buy or sell the property in question (substantive offer)
  2. a contract by which the grantor of the option binds himself to the grantee to keep the substantive offer open for a certain period of time
- the oral offer was of no force and although the option contract may be entered into orally, there was in this case no valid offer to which such a contract could relate

Trotman v Edwick

Facts

- E bought 2 flats from Mr. and Mrs. T
- Flats enclosed by a garden wall, which also enclosed a strip of municipal land
- Mr. T, by positive act and statement indicated to E that the entire land enclosed was part of the property sold
- When E discovers the truth he sues for damages on the ground of T intentional misrepresentation

Court held

- Court *a quo* awarded him the difference between the price paid and the actual value of the property
- The AD upheld the award
- Delictual damages awarded for fraudulent misrepresentation

Note

- Important case for approach to question of quantum of damages recoverable on ground of fraudulent misrepresentation
- Fraudulent misrepresentation amounts to a delict and delictual damages are recoverable
- To determine financial position of person had the misrep not occurred it is necessary to distinguish between casual fraud (dolus dans) and incidental fraud (dolus incidens)
  - Dolus dans: fraud which induces the representee to enter into a contract which he would not have entered into at all in the absence of the misrep. The amount which the representee's performance exceeds the representor's performance is awarded
  - Dolus incidens: fraud which induces the representee to agree to terms to which he would not have agreed if there had been no misrep, although he would still have entered into the contract. The amount

by which the representee's actual performance exceeds the performance on which he and the representor would have agreed had there been no misrep.

De Jager v Grunder

Facts

- J and G enter into a contract of exchange which they describe as a contract of Sale
- G's farm is exchanged for J's 2 farms
- A value was attached to the farms to determine what cash adjustment has to be made to equalize the performances
- The value placed on one of J's farms was inflated by fraudulent misrep by J that there were more trees on the farm than there actually were
- G brought action for damages- J contended that in spite of the misrep G had received as mush as he had given and therefore suffered no loss

Court held

- A quo and AD awarded G R15 000 damages
- If there was no misrep the valuation of the farm would have been R15 000 lower while the value of the other 2 would have remained the same

Note

- AD reviewed this case as one of dolus incidens

Ranger v Wykerd

Facts

- R bought house from W for R22 000
- There was a swimming pool on the property which W claimed to be structurally sound although she knew it leaked
- R then had to have the pool repaired after he took transfer of the house and discovered the fault. He claimed damages as a result of the fraudulent misrep.

Court held:

- AD held R had proved loss due to repairing the pool
- This amount of damages could be arrived at in 1 of 2 ways:
  1. value of the property less R had paid for it (casual fraud)
  2. by accepting that if there had been no misrep the parties would have agreed on a purchase price lower than what he initially paid for it (incidental fraud)

Bayer South Africa v Frost

Facts

- F was a wine farmer who also grew wheat and onions
- The wheat and onions were planted next to the vineyards. Vineyards have to be weeded annually during off season
- A rep of Bayer told F that weeding could be done more efficiently and cheaply by spraying the vineyards by helicopter with weed-killer developed by Bayer
- The weed killer wouldn't harm the vineyards but would destroy the wheat and onions
- Rep negligently led F to believe that the spraying could be controlled
- F acted on this misrep and a large strip of wheat and onions was destroyed
- F was awarded R55 000 as damages as a result of the negligent misrep

Note

- AD- a delictual action for damages may be instituted where a negligent misrep induced the conclusion of a contract as a result of which the misled party suffers damage

Phame v Paizes

Facts

- Paize's bought Phames shareholding in a Company whose main asset was an immovable property on which there was a shopping center
- What induced Paizes to buy the company was the income that was derived from letting the buildings on the property
- The value of the shareholding depended on the net amount of rent which the property produced
- Part of the expenses was the municipal rates which the Phame agent told them was R4646
- It later emerged that the annual rates were actually R14736

- Phame them claimed an amount from Phame on the ground of the agents misrep.
- Phame then said that Paizes did not allege either a fraudulent or negligent misrep and that no claim for damages lay on the ground of innocent misrep

Court held

- AD dismissed this exception, deciding that *action quanti minoris* would lie
- Court held adelition actions do not lie on ground of innocent misrep, but they do lie on the ground of a dictum et promissum
- *action quanti minoris* for reduction of purchase price and *Actio Rehabilitoria* for cancellation of a contract of sale
- the agents statement about the municipal rates was such a dictum et promissum

Note

- an innocent misrep can form the basis for avoiding a contract
- for a delictual action for damages fault is a requirement therefore, innocent misrep does not form the basis for a delictual action
- action quanti minoris does not result in a delictual action
- Actio quanti minoris can only be instituted on the basis of dictum et promissum
- dictum et promissum is wide enough to include culpable misrep
- Actio quanti minoris can only be instituted where in the case of a contract of sale a misrep exist regarding the quality of the thing sold

Wells v South African Alumenite Company

Facts

- SA Alumenite sued Wells for purchase price of lighting plant which he bought from the company
- Wells raised the defence that he had been induced to buy the plant by a misrep made by the Company rep a d claimed recission of the contract
- But, he had signed an order form exempting the company from liability for an representations made by its rep and it was held that in the absence of an allegation that the company had made a fraudulent misrep Well's defence could not succeed

Note

- A contractant cannot exclude his liability for fraudulent misrep
- He can exclude his liability for negligent or innocent misrep

Broodryk v Smuts

Facts

- B was threatened with internment in a concentration camp or imprisonment if he did refused to join the army
- B was persuaded to join the army. B claimed recission of contract on basis that contract had been bought about by duress
- Minister excepted to B's claim on the ground that it disclosed no cause of action

Court held

- Exception didn't exceed. All 5 elements required to make a contract voidable on the grounds of duress were present

Note

- If all the elements of delictual liability are present un a particular case of duress, the victim will naturally also be entitled to claim damages

Preller v Jordaan

Facts

- J was an elderly farmer suffering from an illness
- J was concerned about what would happen to his wife and farm laborers should he die
- P his medical practitioner, persuaded J to donate and transfer his 4 farms to P who would then administer them for the benefit of J's wife and farm laborers
- P then transfers the farms to His son, to his 2 daughters and himself
- J instituted action against P, when his health returned, claiming retransfer of the farms to him

Court held

- All 3 excepted to the claim on the ground that undue influence did not, in Roman-Dutch law, constitute a ground for setting aside the contract of donation and subsequent transfers
- The AD dismissed P's exception and held that Roman-Dutch laws of *restitatio in integrum* provided authority for the view that in our law undue influence rendered a contract voidable

- Exceptions of the son and daughter where upheld- ownership had passed to P, who as owner, validly transferred ownership to son and his 2 daughters and they had no part in influencing J therefore no ground existed for the retransfer of the farms

Neethling v Klopper

Facts

- N sold farm to K and others
- Balance remaining on purchase price to be paid in installments
- N alleged that buyers defaulted and notified them that he's canceling the sale
- Eventually came to an agreement where the buyers undertook to pay full purchase price of the farm
- N alleged breach of contract, and cancelled contract of sale again. Buyers claimed transfer of farm against payment of purchase price
- N admitted that there was no breach, but said contract was void because of non-compliance with S1(1) of act 68 of 1957
- N argued that the new agreement brought a new contract for sale of land into being and amendment of original contract also had to be in writing

Court held

- AD that N was bound to original contract because the agreement between the attorneys didn't bring a new contract of sale into being and the agreement between the attorney's didn't effect a material amendment therefore no need to comply with the formalities

Goldblatt v Fremantle

Facts

- F and G concluded an oral contract that F would supply G with Lucerne
- They agreed that arrangement reduced in writing by F and confirmed by G
- F started supplying G with Lucerne, F set out terms in a letter to G and asked G to confirm terms in writing- G failed to do this
- F stopped supplying him with Lucerne and G sued F for breach of contract

Court held

- AD the action failed because F and G agreed that the contract of sale between them be in writing and not verbal, no contract existed in absence of required written confirmation by G

SA Sentrale Ko-op Graanmaatskaapy v Shifren

Facts

- Lessee entered in a contract of lease with Shifren (lessor)
- The contract had a clause prohibiting subletting or ceding rights without lessors written consent and variation of the lease had to be in writing
- When lessee later ceded his rights to a 3rd party without consent, the lessor cancelled the contract and sued for ejectment
- The lessee's defense was that there had been an oral variation of the non-variation clause to the effect that an oral consent by the lessors to a cession would suffice and the lessor's had given such oral consent

Court held

- AD that the parties are bound by non-variation clause

Note

- Non-variation clause will protect a contract against oral variation only if the non-variation clause is itself entrenched against oral variation therefore the contract can only be amended by a written agreement between parties

Jajbhay v Cassim

Facts

- J and C entered into an illegal sublease of a residential stand. C, the sublessee, was carrying out all the terms of the contract when J applied for her ejectment

Court held

- Order was refused
- AD held that 2 rules are applicable:
  1. *Ex turpi causa non oritur actio* – no action arises from a dishonorable cause therefore; an illegal contract is void and unenforceable- Absolute rule! One would expect that restitatio in integrum can be claimed when there has been performance in terms of an illegal contract, but this is prevented by rule 2

2. *In pari delicto potior est condition defendentis seu possidentis*- in case of equal guilt the defendant or possessor is in the stronger position (possidentis rule). This is not an absolute rule, the guilty party may be allowed to recover his performance if public policy or simple justice between man and man requires it

- AD in casu there are no grounds for relaxing the rule

Note

- Illegal contract: conclusion, performance and purpose- contrary to common law/statutory law, public policy and good morals

Magna Alloys and Research v Ellis

Facts

- E employed by Magna as a commission agent
- Contract of employment contained a clause prohibiting E from doing any business in competition to the company within a defined area for a period of 2 years after termination of his employment with the company
- After leaving the company E started working for a company in competition with Magna and therefore breached the restraint clause
- E subsequently claimed outstanding commission and Magna counterclaimed for damages on the grounds of E's breach of restraint clause

Court held

- Court a quo rejected the counterclaim but this decision was reversed on appeal
- AD held that the restraint clause was unenforceable only if it is against public policy and onus rests on the party bound by the restraint to prove that it is against public policy.
- E didn't succeed in proving restraint was against public policy

Note

- The restraint of trade must be reasonable between the parties, must not be against public policy, the validity of the clause is determined with regard to circumstances existing at the time of conclusion of the contract.
- A court may find that art of the restraint is enforceable or unenforceable

Minister van Landbou-Tegnise Dienste v Scholtz

Facts

- S, breeder of bulls, sold one to M
- S knew M intended to use the bull for breeding
- Bull was infertile and M claimed cancellation of the sale and a refund
- M relied on the tacit consensual warranty which he alleged S had breached- the claim was made more than a year after the sale
- S argued that to cancel a sale, must do so on the ground of latent defect, can only do so with actio redhibitoria which is a naturalia of every contract of sale and prescribes after a year

Court Held

- Reject S's argument actio redhibilitoria didn't exclude consensual warranty
- S and M did have such a tacitly incorporated warranty and has a 3 year prescription period

Note

- This case is important for the distinction between the naturale and incidentale of a contract
- Naturale are consequences attached to a particular contract ex lege e.g. Seller liable of latent defects: the purchaser can claim *Actio redhibitoria* resile from a contract or *actio quantis minoris* claim reduction in purchase price
- Incidentale are consequences not attached ex lege, but is tacitly decided by the parties

Van Den Berg v Tenner

Facts

- T sold a ½ share in his farm and 49% shares in Brick co to VdB
- Purchase price was R50 000, VdB paid R10 000
- VdB then withdrew from the contract
- T sold Farm to Mobile Earthmoving Services and Brickworks to V, N, W
- Then T and VdB contract to cancel the original contract and T refund VdB the R10 000
- They agreed that repayment came from new sale of farm and shares
- T cancelled both contracts and VdB claimed immediate repayment of the 10K
- VdB alleged that the repayment was a tacit term of the 2nd contract
- T argued that the terms regarding the fund from where the repayment was supposed to come was a suspensive condition and its non-fulfillment extinguished the obligation

Court Held
- The terms regarding the fund did not equal a suspensive condition but a tacit term between T and VdB did exist therefore, judgment in VdB's favour

Note
- No need to actually intend term

Fourie v CDMO homes

Facts
- Homes sold a piece of land bordered by a stream to F
- Agreement made subject to the "condition" that there were pumping rights
- Neither party knew whether such rights existed
- F stopped paying installment when he discovered there were no pumping rights. Homes sued for payment
- F claimed refund

Court held
- In favour of F
- Parties contracted subject to supposition that there were pumping rights since the supposition was false the contract was void ad initio

Note
- A condition is a term which qualifies a contract with reference to an objectively uncertain future event therefore, can never refer to a past/present state of affairs

Jurgens Eiendomsagents v Share

Facts
- Share sold his house to Smith through agency of J
- Purchase price financed as follows: R1400 cash deposit, R45 600 bank transfer and a guarantee for R10 000 to be furnished by Smith after selling his house. The guarantee had to be furnished before 30 March 1984
- Share had to pay J commission, even if cancelled
- The cash deposit and bank transfer were received, but the guarantee wasn't paid timeously and Share refused to continue with the transaction
- J sued Share for commission
- Shares defence was that the guarantee was a suspensive condition which wasn't fulfilled therefore no contract of sale was concluded

Court held
- AD rejected Share's agreement
- Contract actually has 3 suspensive conditions: approval of the transaction by Smiths employer, obtaining a bank loan and sale by Smith of his house
- All 3 had been fulfilled therefore enforceable contract of sale and therefore, J can claim commission
- The guarantee was not a condition it was merely a term with a time clause attached

Note
- Terms refer only to those arrangement which create obligations
- Conditions refer to arrangement by which obligations are qualified in such a way that their operation and consequences are made to depend on the happening or not happening of an uncertain future event

Bank of Lisbon v De Ornelas

Facts
- 2 respondents were joint MD's of a company which caught and sold fish
- Appellant granted company overdraft and demanded they register mortgage bonds over their homes and bind themselves as sureties to the appellant to secure the company's overdraft.
- The intention of the parties was that the securing would cover the company's overdraft, the bonds and deeds of suretyship were drafted in wide terms to provide that they would secure any debt which the company owed the appellant
- Respondents request cancellation of the mortgage bond, deeds of suretyship and negotiable certificate of deposit
- Appellant refused to comply and alleged it was entitled to retain security to cover a claim for damages which it intended instituting against the company
- The claim arose from a transaction which was not in contemplation of any of the parties when the security was furnished
- The CPD granted the respondents setting aside order

AD held:

- Set aside the CPD decision
- Appellant was entitled to retain the security to cover the claim for damages
- Respondents relied on the exceptio doli
- The exceptio doli not received into Roman-Dutch law and therefore not part of our law.

Nel v Cloete

Note

- When is a debtor in culpable delay (in mora debitoris)? When the parties didn't expressly/tacitly agree to a time for performance and when a creditor may resile from the contract because of the delay.
- When there is no date for performance the debtor must perform in reasonable time. If he fails to form he is not yet in mora
- He must be placed in mora by means of a demand (interpellatio, which must allow for a reasonable time) Should he then still fail to perform he is in mora ex persona
- Should there be an agreed time for performance and the debtor fails to pay he is then in *in mora ex re*
- Mora debitoris is a form of breach of contract, therefore the creditor has an action for damages and the right to cancel the contract
- Should the creditor wish to cancel the contract the mora debitoris must be serious i.e. lex commissoria and notice of rescission
- Notice of rescission and interpellatio can be given immediately after conclusion of the contract; they can be given together or separately; time allowed for performance is judged objectively; it is not expressly decided whether time that passed before notice is a factor to consider

Goldstein & Wolff v Maison Blanc

Facts

- Delivery of dresses too late and Maison blanc cancelled contract because G was in mora ex re

Court held

- Contract required performance before a certain date, therefore agreement was reached regarding date for performance and the appellant was automatically in mora ex re
- The court considered the nature of the contract and the surrounding circumstances: the parties intended "time to be of the essence"
- The parties tacitly agreed that respondent would have right of cancellation if performance didn't take place timeously
- This case is mora ex re coupled with lex commissoria

Sweet v Ragerguhara

- Sweet bought immovable property, which wasn't properly vacated?
- Important case for difference between mora debitoris and positive malperformance
- In casu there wasn't merely a delay in giving the applicant undisturbed occupation of the thing he bought (this would have been mora debitoris). Occupation was given but it didn't satisfy the requirements for undisturbed occupation
- Therefore couldn't cancel contract on the basis of mora debitoris

Ranch International Pipelines v LMG Construction visa versa

Facts

- R subcontracted some building work to LMG
- R then sought an order against LMG to vacate the site and stop working
- LMG bought a counter application to interdict R from interfering in LMG's building work

Court held

- Granted LMG's counter application because the creditor must co-operate to make it possible for his debtor to render performance
- Mora creditoris is recognized as a separate form of breach of contract

Note

- Mora creditoris occurs when a creditor, whose co-operation is necessary to enable the debtor to perform, fails to render his co-operation timeously, but performance still remains possible

Stewart Wrightson v Thorpe

Facts

- Appellant= merger of 2 companies: bray Gibb a subsidiary in natal, and Mathews Wrightson, also a subsidiary in natal
- The respondent started working for BG in 1964 as director and MP of the natal subsidiary

- The respondent was unhappy with the proposed merger and orally informed BG that he was leaving
- In terms of the respondent's contract, his resignation had to be in writing and 6 months notice was required. On the 24th may the respondent wrote a letter and gave 6 months notice. On the 29th may BG insisted he resign immediately, and he was not required to do work for the company for the 6 months and would receive his full salary
- The respondent took this as a repudiation of his contract and started working in direct competition with BG

Note

- Repudiation as an offer does not equal a breach of contract. It only became a breach of when the other party accepted it
- This is a case of repudiation by the creditor. The test of whether repudiation occurred is objective
- The time and place of the breach is the time and place of the repudiation

Tuckers land & development corp. v Hovis

- Breach in anticipando- this is a breach that can take place even before performance becomes enforceable
- Form of either repudiation or prevention of performance
- Any conduct which indicates with reasonable certainty that a performance which is owing will not be rendered when it becomes due is sufficient to constitute repudiation
- Test for repudiation is objective
- NB question- whether it can be reasonably inferred from the repudiators conduct that malperformance will take place in the future

Benson v SA mutual Life assurance society

Facts

- SA bought shares from B
- B delivered most of the shares and failed to deliver some of the shares
- SA claimed delivery of the outstanding shares
- B said that SA could get the shares from another source & a claim for damages would compensate them adequately and an order for specific performance should be refused

Court

- AD rejected B's argument:
- The plaintiff had the right to choose between holding the defendant to the contract and claim specific performance, or to claim damages
- The court has the discretion to refuse specific performance in certain circumstances, such as if injustice were to occur as a result, or to satisfy the demands of public policy etc.

BK Tooling v Scope Precision engineering

Question:

- What is the position where a plaintiff has rendered performance but his performance is defective?

Court held:

- Any contracting party has in principle a right to the specific Performance undertaken by the other party (i.e.-he has the right, in principle, to enforce the contract strictly according to its terms)
- The right of a party to a reciprocal contract to withhold his performance until the other party performs in full is a powerful weapon to enforce full performance
- In principle, therefore a defendant who has accepted the plaintiff defective reciprocal performance is entitled to raise the *exceptio* against the plaintiff's claim even if the plaintiff's performance is defective in MINOR ASPECTS only.
- However where FAIRNESS SO REQUIRES a court may, at its discretion, REFUSE TO ALLOW a defendant to raise the *exceptio* and to order him to render a reduced performance.

Mahabeer v Sharma

Facts

- S sold erf to M (3 July 1977)
- S acquired the right to rescind the contract on the ground of M's breach 15 Sep 1980
- S executed this right on the 3rd Feb 1981
- M raised the defence of effluxion of time and claimed transfer

Court

- AD dismissed M's claim
- Effluxion of time could terminate a right only where that right has prescribed otherwise failure to exercise right within a reasonable time only serves to indicate waiver of the right

Swart v Vosloo

Facts
- S leased premises on which there was a bottle store to V
- The lease granted V an option to buy premises during the lease
- S could cancel lease if V or any of his employees was prosecuted under the liquor act
- One of V's employees was prosecuted
- S's attorney wrote a letter to V cancelling the lease
- Letter delivered to V's office at 12:00 on 4th March, but V only read it at 15:00
- At 14:50 on the same day, V delivered a letter to S in which he exercised the option
- S read the letter immediately

Court held
- AD: V had exercised the option 10 minutes before S cancelled the lease and that the option had been validly executed
- Requirements to cancel a contract are stricter than the requirements to conclude one

Lavery & co v Jungheinrich

Facts
- L claimed damages for breach of contract from J
- J= the manufacturer of steel scaling shafts, but supplied L with defective shafts
- L resold the shafts and its business reputation suffered severely

Legal question
- Could loss of trade and injury to business reputation (special damages) be compensated?

Court
- Curlewis JA applied the contemplation principle
- Wessels JA applied the stricter convention principle
- Both concluded that damages couldn't be recovered

Whitfield v Phillips

Facts
- W sold farm to P
- W knew P needed farm for cultivating pineapples on large scale
- After conclusion of contract P bought 1 million pineapple plants
- Later W repudiated the sale and P cancelled contract
- P sued for the following damages: compensation for loss of 1years crop and compensation for loss of certain plants already established on the farm

AD held:
- The loss in respect of the crop from the plants must have been in contemplation of both parties as a probably consequence of repudiation
- This claim set aside because probably already included in purchase price of the farm

Note
- Loss of profit as a result of breach of contract is not intrinsic damage
- Although liability of a 3rd party to compensate for such damages is based on agreement (convention) Steyn JA doesn't expressly apply the convention principle, he appears to apply the contemplation principle
- Mitigation rule- there is a duty on the victim of a breach of contract to limit his damage as far as possible. The victim must take reasonable steps to limit his loss

Shatz Investments v Kalovymas

Facts
- K hired premises from S to conduct restaurant and fast food business
- Lettor prohibited by the contract from letting any other building on the premises for a similar purpose
- S breached this contract by letting to another fast food store
- K's business was adversely affected
- K cancelled the lease and claimed damages from S
- Basis of claim was the loss of goodwill which K suffered

AD held:
- Loss of goodwill equals a claim for special damages
- Applied the convention principle
- Decisive time of determining the parties contemplation is the time of contracting

Holmdene Brickworks v Roberts Construction

Facts
- R bought bricks from H, the bricks were used in a building for a 3rd party

- After the brickwork was completed- a large number of bricks were defective and starting to crumble
- R tore down walls and rebuilt them with bricks from another source
- R claimed loss suffered as a result of having to tear down the walls/ consequential loss

AD held

- Confirmed the award of damages by trial court
- Consequential loss= general damages therefore presumption arose that the loss ha been contemplated by the parties & therefore unnecessary for the plaintiff to prove that the parties had actually contemplated the loss
- Mitigation rule applicable

Van Zyl v Credit Corporation of SA

Facts

- VZ bought a car on hire purchase from a garage, having been induced to do so by misrepresentation made by the garage
- VZ traded his own car in, paid deposit, bound himself to pay monthly deposits
- The garage then ceded its rights to Credit Corp who then became entitled to the installments
- After paying 2 installments to Credit corp., VZ became aware of the misrepresentation- he instituted action against credit corp., he claimed refund of the money paid to credit corp. and the garage, rescission of the contract and return of his car or its value
- Credit corp. raised the exception that those particulars disclosed no cause of action against it
- The court agreed

Note

- No one can transfer a better right than he himself has
- Debtor cannot transfer his duties without consent of creditor

Peters, Flamman & co v Kokstad Municipality

Facts

- P concluded a contract to erect street lights with K prior to the outbreak of WW1
- In 1915 the partners of P were enemy aliens and were interned and the partnership was wound up
- K sued for damages for breach of contract

AD held:

- In the case of supervening impossibility, the position in our law is the same as in Roman law- the obligations which arose at the time of contracting is extinguished as soon as performance becomes impossible
- Debtor consequently discharged from his duty

Note

- If performance is impossible at the time of concluding the contract no obligation arises

CONTRACT PREP
QUESTIONS:

1. Distinguish an option from a right of pre-emption.

Description: An option may be defined as a substantive offer reinforced by an agreement in terms of which the grantor undertakes as against the grantee to keep open his offer, with the result that the grantee acquires the competence to consider the offer and to accept or reject it.
A right of pre-emption is an agreement in terms of which one prospective purchaser acquires a preferential right to contract with the seller should the latter actually decide to sell.

The option contract obliges the grantor to maintain his substantive offer in accordance with the terms of the option contract. A substantive contract arises if the grantee accepts the substantive offer. The option holder determines whether a contract in accordance with the substantive offer arises.
A right of pre-emption does not place a duty on the grantor to sell the subject matter of the right; the grantee merely acquires the preferential right to buy should the grantor decide to sell. The obligation of the grantor is negative. The grantor may not alienate the thing to a third party except under the conditions prescribed in the agreement creating the right. The grantor primarily determines whether the parties will conclude a substantive agreement, usually after negotiating the contractual terms.

Breach of an option contract and the consequences thereof are governed by the general principles of the law of contract. Should the grantor of the option attempt to revoke the substantive offer contrary to the option contract, the holder of the option may enforce the contract specifically by means of an interdict. Furthermore, damages may be claimed to place the option holder in the position he would have been in if the option had been exercised.
In the case of breach of a right of pre-emption the holder may apply for an interdict to prevent the grantor from alienating the thing to a third party. A claim for damages is also available. It seems uncertain whether the holder may claim specific performance but in associated SA Bakeries the court found that in the even that the grantor contrary to the right of pre-emption concluded a sale agreement with a third party, the holder may step into the position of the third party by way of a unilateral declaration of intent.

2. Simon lives in Johannesburg, he sends a letter to Peter, who lives in Bloemfontein, by private courier. In the letter, Simon offers to sell Peter his car, a red Honda, for R200 000. In the letter, Simon states that his offer will fall away on 1 April. Peter accepts Simon's offer by letter, which

he posts on 30 March. Simon receives the letter on 5 April and only reads it the next day. Peter pays the R200 000 but Simon refuses to accept payment. Did a valid contract arise between Simon and Peter? Advise Peter and substantiate your answer.

The question is whether Peter has accepted Simons offer in time and thus whether Simon and Peter have reached consensus. Simons offer lapses after the time that he has prescribed for acceptance. Although Peter accepted the offer in time, Simon was only informed of the acceptance after the time set for the lapse of the offer, by reading the letter. The general rule is that acceptance must be communicated to the offeror for consensus to arise (R v Nel) (Cape Explosives Works) (Smeiman v Volkersz). The principle is that actual and conscious agreement between the parties form the primary basis for contractual liability. The parties must be aware of their unanimity.
The offeror may, however, expressly or tacitly waive his right to notification of acceptance. Simon did not expressly do so as the offer contains no words to that effect, but Simon tacitly did so by making his offer by post. He had tacitly indicated that his offer was accepted as soon as Peter posted his letter of acceptance. Peter is not obliged to accept by post. We can conclude that Simon and Peter did not reach agreement before Simons offer lapsed.

3. Name and briefly discuss the requirements for a valid offer & a valid acceptance. Discuss with reference to case law. (15)

The offer must be definite and complete
The offer must embody or contain sufficient information to enable the person to whom it is addressed to form a clear idea of exactly what the offeror has in mind. The offer must be so certain that it is enough for the addressee merely to answer 'yes' for a contract to be constituted. The offer must be clear and certain.
The offer must contemplate acceptance and a resultant obligation
It is not enough for the one party to make a tentative statement to the other merely to sound him out, that is, to find out whether he would be prepared to enter into negotiations.
Thus, the offer must be a firm offer.
An important question arises in this connection with regard to the legal effect of advertisements.
For instance, a shop-keeper places an advertisement in the window of his shop: 'Jimmy Choo shoes obtainable here at R1500 per pair'.
This statement does not constitute an offer since the advertiser clearly could not have contemplated that mere acceptance of his statement would create a legal bond between himself and the acceptor. (Crawley v Rex)
However, a promise of reward is a form of advertisement that does constitute an offer. (Bloom v American Swiss Watch Co)
The offer must come to the attention of the offeree (addressee)
This requirement is a natural consequence of the fact that, as has been stated, an agreement is a conscious or stated mutuality of consent.

The offeree must therefore have knowledge of the offer to be able to react to it. (Bloom case)

An offer must as a rule be directed at a definite person (offeres) or persons (offerees), although it may also be directed at undefined persons.
An offer directed at a defined person or persons: Where an offer is addressed to unascertained persons, it may be accepted by anyone of them, but where it is addressed to a specific person or persons, it may be accepted by only the addressee(s). An offer directed at undefined persons: A promise of reward, and auctions, are forms of this type of offer.
An offer lapses in the following circumstances:

- **after the expiry or lapse of the prescribed time, or of a reasonable time**
- **upon the death of either the offerer or the offeree**
- **upon being rejected**
- **Upon revocation.**

Requirements for a valid acceptance
The acceptance must be unconditional and unequivocal
When the acceptance contains conditions or reservations, it is no acceptance but is in fact a counter-offer which the original offeror may accept or reject in turn.
The offer must be accepted by the person to whom it is addressed
The offer cannot be accepted by anyone but the person to whom it is made.
The acceptance must be a reaction to the offer – a person cannot accept an offer of which he is not aware
Bloom v American Swiss Watch case:
In casu, the company offered a reward to any person who could provide information which would lead to the arrest of thieves who had stolen jewellery from the company.
B furnished information while ignorant of the reward offered.
When the advertisement of the reward came to his notice, he tried to claim the promised sum from the company.
Court held that he could not claim the reward because 'until the plaintiff knew of the offer he could not accept it, and until he accepted it there could be no contract'.
Thus, if the one did not know what the other was proposing, the 2 minds never came together.
The acceptance must comply with any formalities set by law or by the offeror
The acceptance must comply with formalities for a valid contract to arise.

4. Briefly distinguish simple auction from auction subject to conditions. (5)

Simple auction:

Here the most acceptable construction is that the bidder makes an offer which the auctioneer considers & either accepts or rejects. Making of a higher bid doesn't mean displacement of a previous bid per se.

Auction subject to conditions:
Conditions may relate to many things: manner & time of payment, passing of ownership, auctioneer's remuneration, fact that articles are sold voetstoet (as it is) & so on. These conditions relate to the contract of sale which are envisaged. The auction can take place with or with out reserve. Auction subject to conditions isn't same as auction with reserve – the latter is 1 of conditions. These conditions may be advertised in various ways – isn't binding on auctioneer. If auctioneer announces conditions of auction he's making an offer. Therefore making the offer to undefined persons, so by bidding, the bidder accepts the conditions, therefore conditions are now binding on both parties & now auctioneer is bound to accept the highest bid (contract of sale arises = substantive contract).

5. Discuss whether an advertisement & a promise of reward constitutes an offer. (10)

It's not enough for 1 party to make a tentative statement to the other merely to sound him out, that is, to find out whether he would be prepared to enter into negotiations. Offer must be a firm offer; a tentative statement with a possible agreement in mind isn't sufficient.

An NB Question arises in this connection with regard to the legal effect of advertisement. E.g. shopkeeper places ad in window: 'Shoes obtainable here for R150 per pair' – this statement doesn't constitute an offer since advertiser clearly couldn't have contemplated that mere acceptance of his statement would create a legal bond between himself & the acceptor. If more people accepts the statement than there is stock – this advertisement as an offer would therefore lead to impossible situations; its in fact no more than an invitation to do business. Advertiser's real intention is to elicit or invite an offer from some member of the general public. (<u>CRAWLEY V REX</u>). Therefore an advertisement doesn't generally constitute an offer.

There is however, 1 special kind of advertisement which does constitute an offer, namely a promise of reward. It often happens that a reward is offered to any person who performs a certain act, for e.g. restores a lost article to its owner. (<u>BLOOM V AMERICAN SWISS WATCH CO</u>). Promise of reward is a form of advertisement that does constitute an offer.

6. Discuss 'Cape Explosive Case' and 'Smeiman v Volkerz Case' with regards to the moment of formation of a contract (6)

<u>Cape Explosive:</u>
Offer & Acceptance – Where & When are contract's concluded by post entered into.

Contracts concluded by written offer & written acceptance. Both offer & acceptance were by letter sent through the post. In order to decide whether it had jurisdiction court had to determine where contract was concluded.
Contract concluded at place where offeree posted letter of acceptance.

<u>Smeiman v Volkerz:</u>
Offer & Acceptance: General rule is that no consensus until offeror knows that his offer is accepted, offeror may stipulate a particular means of acceptance.

Here offer was made orally & acceptance by post. Acceptance received too late. There was no contract since the option had not been exercised on or before 15 February. The making of a verbal offer doesn't impliedly authorise a postal acceptance. Expedition theory will apply where acceptance takes place by post only if the offer has also been made by post or offeror has otherwise indicated that offeree must use the post – in other words not accepted here.

7. State the possible remedies for breach of a pre-emption (4 of them) (3)

Right of pre-emption may be coupled with an option granted by the purchaser. If this happens, the prospective purchaser is compelled to keep open his offer to buy, for the agreed period & the prospective seller is obliged, if he decides to sell, to exercise the option granted him in so doing to accept the offer.

The prospective seller may bind himself as against the prospective purchaser to offer the thing for sale to the latter at the 1st acceptable price or at the highest price which may be offered to him by a 3rd party. If the seller receives an offer from a 3rd party he may not accept it before he has given the holder of the right the opportunity to decide whether he wants to buy the thing at that price. Holder of the right is not obliged to buy the thing.

The seller may bind himself as against the prospective purchaser to offer the thing for sale to the latter on the occurrence of a future event for e.g., when it is decided no longer to use the land as a race track. Holder not obliged to buy it.

Prospective seller may bind himself as against the prospective purchaser to sell a thing to a 3rd party only if the prospective purchaser is unwilling to buy the thing.

8. Briefly explain the legal nature and consequences of a right to pre-emption (5)

Contract of pre-emption doesn't place duty on grantor to sell the subject matter of the right; grantee merely acquires the preferential right to buy

should grantor decide to sell. Prospective seller's capacity to alienate thing is thus restricted.

Prospective purchaser also acquires a right therefore, but whereas the performance to which the grantor of an option is bound is the maintenance of an offer. The obligation in the case of the right of pre-emption is a negative-one that is that, the thing may not be alienated to a 3rd party, except under the conditions prescribed in the agreement creating that right. This situation differs from an option, in that it is now the seller & not the buyer who makes the critical decision whether a contract of sale is to be concluded or not.

9. Martin wants to sell his art collection, since he is offering the collection at a bargain price he only wants to extend his offer to colleagues at work. Martin advertises by way of sending electronic mail messages to his colleagues. Monty obtains access to the computer network system at Martin's work place and accepts Martin's offer by sending Martin an electronic message. Once Martin discovers that Monty isn't a colleague he alleges that no ***contract*** arose because the offer wasn't made to Monty. Monty alleges that a valid ***contract*** did arise because the electronic mail message sent by Martin doesn't specifically state that the offer was only open to Martin's work colleagues. Discuss with reference to 'Steyn v LSA Motors' and other relevant case law whether a valid ***contract*** arose between Martin and Monty. (15)

Contract denier is Martin & contract enforcer is Monty. Consensus exists when:

1. **The parties have agreed on the nature of the obligations they intend to create, that is, have agreed on the persons between whom the obligations are to be created & on the contents of the obligations, that is the performances to be rendered.**
2. **The parties have to be bound by the contract, that is, have agreed to create juristic consequences.**
3. **Are aware of their agreement.**

If for some reason or other the parties are not in agreement regarding 1 or more of the elements of consensus, actual agreement between them is excluded & there is a material mistake.

Material Mistakes:

1. error in negotio

2. error in persona

3. error in corpora **Non-Material Mistakes:**

1. error in substantia (error in qualitate)

2. error in motive

<u>Will/Intention Theory:</u>

This is the theory that the agreement or consensus between the parties is the basis of the contract, it must lead to the conclusion that once it is certain that there is no consensus, it is also certain that there is no contract, & if no contract did in fact come into existence, either party

should be able to rely on the fact in order to escape liability. Thus consistent application of this theory would mean that every material mistake would exclude contractual liability (void). (In other words, all material mistakes are VOID & all non-material mistakes are VALID).

<u>Reliance Theory:</u>

A contract is based on the intention of 1 party to an agreement & the reasonable impression or reliance on his part that the other party had the same intention. It's immediately clear why the reliance theory is regarded as ONLY supplementary to the will theory:

If the 2 parties do have coinciding intentions there is consensus & no need to enquire whether 1 of the parties had any particular impression of the other's intention. But, if there is a material mistake by 1 party or both, & therefore no actual consensus, the reliance theory acknowledges a contract IF 1 of the parties, in a reasonable manner, relied on the impression that there was consensus.

The Direct reliance theory applies in the asking of certain questions:

1. Was there a misrep of one of the contracting party's intention?

2. Who made the misrep? (denier)

3 (a) was the other party misled?

(b) would a reasonable person have been misled?

if the answer to these questions is 1. Yes, 2. Denier, 3. Yes and (b) yes – then the contract will be VALID despite the material mistake, as the enforcer of the contract relied reasonably on the deniers misrep of his intention.

In Steyn: the facts are basically that a Golf board stated that the person who has a hole in one at the particular hole wins a car worth R50000. X (contract enforcer) an amateur golfer got a hole in one there & claimed the price. LSA Motors (contract denier) intended to contract with a certain group of people namely, professional golfers. Court held that even if X was misled by the advertising board which didn't state it only applies to professionals, a Reasonable Person wouldn't have been misled in the circumstances since the rules of amateur golfing states that they may only claim prices worth R600. Here, according to Steyn (X) the contract is valid according to the reliance theory & according to LSA Motors according to the Will theory the contract is void. Court said contract is void.

According to the given set of facts Monty was unreasonable in the circumstances & thus due to the contract is VOID.

OR:

S wants to sell his collection of Beatles compact discs. Since he is offering the collection at a bargain price he only wants to extend his offer to colleagues at his work. S advertises by way of sending electronic mail messages to his colleagues. P, a computer genius who has broken into the computer system at S's place of employment, accepts S's offer by sending an electronic mail message to S. Once S discovers that P is not a colleague he alleges that no contract arose because the offer was not made to P. P alleges that a valid contract did arise because the electronic mail message sent by S did not specify that the offer was only open to S's work colleagues.

Discuss whether a valid contract arose between S and P with reference to Steyn v LSA Motors Ltd 1994 (1) SA 49 (A).(15)

This problem deals with two questions: was the offer by S open for acceptance by P and was there consensus in the light of S's mistake?
The facts of this problem are similar to that of the *Steyn*'s case.
An offer must as a rule be directed at a definite person or persons although it may also be directed at undefined persons. Whether an offer is addressed to certain persons or to unascertained persons depends on the intention of the offeror. Where an offer is addressed to unascertained persons, it may be accepted by any one of them, but where it is addressed to a specific person or persons, it may be accepted only by the addressee(s) (*Godfrey; Bird v Sumerville).*
Although S intended the offer only to be open to his colleagues at work, the expressed offer was apparently open to the public. Mistake is thus also relevant.
The question is whether agreement (*consensus ad idem*) as a contractual basis exists between the parties, as required in terms of the will theory. Agreement has three elements which are: agreement as to the consequences the parties wish to create; an intention to create legal consequences; and awareness regarding unanimity.
In the present case the parties were not in agreement as to the consequences they wished to create since S did not want to contract with P but only with one of his colleagues This is a so-called *error in persona* which in this case is material. This mistake thus excludes *consensus* between the parties; which means that no contract can arise on the basis of the will theory.
However, there the matter does not end because a party may be held contractually liable on the basis of a supplementary ground for liability, namely the reliance theory. This theory may be applied directly as well as indirectly (*iustus error* approach).
According to the direct application of the reliance theory, contractual liability is based on the reasonable reliance that *consensus* has been reached which the one contractant (contract denier) creates in the mind of the other contractant (contract enforcer). According to *Sonap Petroleum* this entails a threefold enquiry:
Was there a misrepresentation regarding one party's intention?
Who made the misrepresentation?
Was the other party actually misled and, if so, would a reasonable man also have been misled?
Should application of this test result in the conclusion that the contract denier misled the contract enforcer to reasonably believe that the contract denier's expressed intention coincided with his actual intention, the contract denier will incur contractual liability even though he is labouring under a material mistake. This is not the case here. S, a party made a misrepresentation regarding his intention (that his offer was open to everyone), but P was not misled thereby because he knew that S did not want to contract with him.

In the circumstances S should not be liable because P knew that S erred and that S did not want to contract with him.

10. X and Y did business with each other for 3 years. Thereafter X inserted a new clause in the ***contract*** that they used without Y's knowledge. This clause reserved ownership in X's favour of goods that Y ordered from X. Although reference was made to the clause in the invoice, X didn't draw Y's attention to the clause. Y alleged that he was not bound by the ***contract*** in which the new clause appeared as he wasn't aware of it. Discuss with reference to case law. (15)

Contract denier is Y & contract enforcer is X.

Consensus exists when:

1. ***The parties have agreed on the nature of the obligations they intend to create, that is, have agreed on the persons between whom the obligations are to be created & on the contents of the obligations, that is the performances to be rendered.***
2. ***The parties have to be bound by the contract, that is, have agreed to create juristic consequences.***
3. ***Are aware of their agreement.***

If for some reason or other the parties are not in agreement regarding 1 or more of the elements of consensus, actual agreement between them is excluded & there is a material mistake.

Material Mistakes:

1. ***error in negotio***
2. ***error in persona***
3. ***error in corpore***

Non-Material Mistakes:

1. ***error in substantia (error in qualitate)***
2. ***error in motive***

Will/Intention Theory:
This is the theory that the agreement or consensus between the parties is the basis of the contract, it must lead to the conclusion that once it is certain that there is no consensus, it is also certain that there is no contract, & if no contract did in fact come into existence, either party should be able to rely on the fact in order to escape liability. Thus consistent application of this theory would mean that every material mistake would exclude contractual liability (void). (In order to, all material mistakes are VOID & all non-material mistakes are VALID).

Reliance Theory:
A contract is based on the intention of 1 party to an agreement & the reasonable impression or reliance on his part that the other party had

the same intention. It's immediately clear why the reliance theory is regarded as ONLY supplementary to the will theory:
If the 2 parties do have coinciding intentions there is consensus & no need to enquire whether 1 of the parties had any particular impression of the other's intention. But, if there is a material mistake by 1 party or both, & therefore no actual consensus, the reliance theory acknowledges a contract IF 1 of the parties, in a reasonable manner, relied on the impression that there was consensus.

A comparison of 2 relevant cases will bring about the answer, namely: George v Fairmead & Du Toit v Atkinsons Motors:

1. ***George: appellant contended he signed a hotel registrar but he actually signed a contract containing a term excluding respondent from liability for certain acts. Appellant wasn't aware of the term because he didn't read the document before signing it. His mistake related to a term which he believed would not be in the contract & was material because it related to an aspect of performance. Respondent believed that appellant read contract. Here, according to George according to the reliance theory the contract was valid & according to Fairmead according to the will theory the contract was void. The contract was therefore valid.***

2. ***Du Toit: appellant signed an agreement containing a term excluding the respondent from liability for misrepresentation. Appellant didn't read before signing & thus didn't know of the relevant term. Mistake related to an aspect of performance & was thus material. Court found that Atkinsons wasn't misled by du to it into believing that du toit had agreed to the term through his signing of the contract because Atkinsons had not drawn du toit's attention to the relevant term. Here, according to Du Toit according to the will theory the contract is void & according to Atkinsons according to the reliance theory the contract is valid. Thus the contract was void.***

According to the given set of facts Y was reasonable in the circumstances & thus due to Du Toit the contract is VOID.
ADD IN 2012 AMENDMENTS AS ABOVE!

11. Discuss the indirect approach to the reliance theory. Refer to case law. (10)

In this theory contractual liability is based on the reasonable reliance that consensus has been reached which the one contractant (contract denier) creates in the mind of the other contractant (contract enforcer). The contract denier's mistake will be reasonable where no reasonable reliance has been created in the mind of the contract enforcer. The mistake will be reasonable in a number of instances. The first one is where the mistake of the contract denier was induced or caused by a misrepresentation made by

the contract enforcer. Fault is not a requirement for this misrepresentation, but unlawfulness is. If the misrepresentation is a positive act it is wrongful in itself. The mistake is then reasonable.
A case directly in point is the Allen case. The plaintiff's error was caused by the seller's agent pointing out an erf that was different from the one in the contract of sale. The plaintiff's error was thus also reasonable. The *iustus error* doctrine
Provides that a party will not be held bound to an agreement if that party apparently gave his or her consent and if his or her mistake is material and reasonable. Once the contract assertor has shown that there is an ostensible agreement, the contract denier bears the onus of providing that his or her mistake is both *material* and *reasonable* in order to be absolved from liability in terms of the apparent contract. If the contract denier succeeds, the contract is void *ab initio,* but if he or she fails, the contract denier will be contractually bound on the terms originally proved by the contract assertor. (*George v Fairmead; Potato board)*

The criteria for ascertaining the reasonableness of an operative mistake.
A material mistake will usually be reasonable if caused by a misrepresentation on the part of the contract asserter. (Allen v Sixteen Stirling Investments)
A negative misrepresentation occurs where a party has kept quiet in circumstances where in law he ought to have spoken out. Silence can constitute misrepresentation (misrepresentation by omission) when there is a legal duty to speak in the circumstances. A legal duty to speak has been found to exist in the following instances:

- **Where the contract assertor knows or ought to know as a reasonable person that the other party is mistaken, he or she must correct the contract denier's wrong impression Eg: *Hartog v Colin & Shields,* the defendants offered the plaintiffs 30 000 skins at prices per pound when they meant to offer to sell at prices per piece. The plaintiffs accepted the offer, well knowing that the defendants had made a mistake and that the prices offered were much lower than the prices the defendants intended to offer. When the defendants realized their mistake, they refused to perform in terms of the contract. The court refused the plaintiffs' claim for breach of contract. The plaintiffs were not entitled to 'snatch at a bargain' which they knew was not intended by the defendants.**
- **Where, prior to the conclusion of the agreement, the contract assertor created an impression directly conflicting with the provisions of the agreement that he or she alleges to be in contract, he or she must draw the contract denier's attention to the discrepancy. Eg: (*Du Toit v Atkinson's Motors Bpk)***

If the contract denier is not to blame for his or her mistake, **in that he or she behaved as a reasonable person in the circumstances would have done and acted without negligence, there is some authority to the effect that the mistake is excusable.**
If the contract denier did not cause a reasonable belief in the contract asserter **that the contract denier had assented to the agreement, an error is *iustus* – in other words, the error is *iustus* when the contract asserter's reliance on the appearance of *consensus* is unreasonable or where there was no real reliance at all.**

12. Perren takes his bike vehicle to Dick's Bikes for a service. On his arrival, he is asked to sign a check card by the owner. Perren enquires why he is required to sign the check card and the owner explains to him that by signing he is authorising them to conduct the service on his bike which will cost R800. He signs the check card without reading it. While servicing the bike, the service manager finds faults on the bike (unrelated to the service) and he proceeds to do these additional repairs for a further R1 000. Perren refuses to pay for the additional repairs and argues that he did not authorise such repairs. The owner of Dick's Bikes argues that Perren is obliged to pay for the work done as the check card contains a contractual clause authorising Dick's Bikes to do any repairs on the bike which they deem necessary without asking the client's authorisation and requiring the client to pay for such repairs. Advise Perren on whether he is liable on the contract to pay Dick's Bikes R1 000 for the additional repairs. Substantiate your answer and refer to relevant case law. Apply the direct approach of the courts in answering this question.
    (10)

The question is whether Perren and the owner of Dick's Bikes have reached actual consensus or ostensible consensus. Perren will not be contractually bound to pay for the additional repairs If this requirement for a valid contract is absent.
Step one is to determine whether agreement exists between the parties, as required in terms of the will theory. Agreement has three elements:

- **∗ agreement between the parties as to the consequences they wish to create;**
- **∗ agreement as to the intention of the parties to create legal consequences; and**
- **∗ an awareness regarding their unanimity.**

Here, the parties were not in agreement as to the consequences they wished to create: Perren thought that he was authorising Dick's Bikes to only service his bike, while the owner of Dick's Bikes knew that the contract also allowed Dick's Bikes to conduct repairs on the bike which they deem necessary and which should be paid by Perren without any further authorisation from Perren. This was a mistake as to the obligations

the parties wished to create and was a material mistake which excludes consensus between the parties. This means that no contract could arise on the basis of the will theory.
In George v Fairmead, the appellant signed a hotel register without reading it. The hotel register contained a term excluding the respondent from liability for certain acts. The appellant was unaware of this term and his mistake related to a term which he believed would not be in the contract and as such was material because it related to an aspect of performance.
In Allen v Sixteen Stirling, the plaintiff believed that he was purchasing the erf shown to him by the seller's agent, while the written contract that he signed indicated the another erf which was a completely different property. His mistake related to performance and was material.
The appellant signed a contract without reading it in Du Toit v Atkinson's Motors. The contract contained a term excluding the respondent from liability for misrepresentation Once again the mistake related to an aspect of performance.
In Sonap Petroleum, the parties concluded a 20-year notarial lease contract. A later addendum to the contract drafted by the appellant's attorney incorrectly indicated that the period of the lease was 15 years. Again the appellant signed the addendum without reading it. The appellant erred with regard the period of the lease which was an aspect of the performance.
However, the matter does not end here, because a party may be held contractually liable on the basis of a supplementary ground for liability, namely the reliance theory. In this regard you were asked to apply the direct reliance approach of the courts. Contractual liability is then based on the reasonable reliance that consensus has been reached which the one contractant (contract denier) creates in the mind of the other contractant (contract enforcer).
According to the Sonap case the direct reliance approach entails a threefold enquiry:

- **Was there a misrepresentation regarding one party's intention? In our question, Perren wanted his bike to be serviced only. Dick's Bikes wanted the power to also unilaterally conduct repairs to the bike, which it deemed necessary. By signing the contract Perren made a misrepresentation that his intention is the same as that expressed in the contract. This happened in the Sonap case.**
- **Who made the misrepresentation? In the problem it was made by a party to the contract, Perren.**
- **Was the other party actually misled by the misrepresentation and, if so, would a reasonable man also have been misled? Dick's Bikes in our question could have been actually misled, but a reasonable man would have taken steps to point out to Perren that the contract allows Dick's Bikes to unilaterally conduct repairs on the bike, because Perren enquired about the purpose of the check card and the owner of Dick's Bikes misled him to believe that by signing the card he is merely authorising the service to be done. In Sonap the court found that the contract enforcer knew that the contract denier was acting under a mistake with regard to the reduction of the term of**

the lease and consequently was not misled by the contents of the addendum. The addendum was thus void. In our question, Perren did not create a reasonable reliance that he wished to be bound to the contract he signed. We can conclude that Perren is not contractually liable to pay R1 000 for the repairs.

13. The following advertisement appears in the newspaper, the Sunday Reporter:

    "AUCTION TOMORROW MORNING"
    A smallholding (portion 1 of the Farm 876, West Road, George) will be sold on Monday, June 21 at 10 am by auction at the property, next to No 11 on the Varkensvlei Road. 9 950 square meters of vacant land in this sought after area must be sold! Quick sale Auctioneers"

    X reads the advertisement and decides to attend the auction. The next day the auction is held. Before the auction begins, the auctioneer announces to those present that the smallholding being sold is 300 meters further down the road and not at the advertised place, where they are standing. Unfortunately, the auction is already in progress when X arrives and he misses the announcement. The smallholding is not sold during the auction. X visits the auctioneer the following day. The auctioneer gives X a street map of the area and tells X that the smallholding is next to the Highlands Estate. X does not know where the boundary of the Highlands Estate is with the result that X never realizes that the smallholding is actually 300 meters down the road. X concludes a contract of sale with the auctioneer acting on behalf of the owner of the smallholding, Y. After conclusion of the contract of sale X discovers that the size of the smallholding is only 9000 square meters and that the smallholding is actually situated 300 meters down the road. You may accept that the contract of sale complies with the required formalities and that the auctioneer acted as Y's representative at all times. Discuss whether X is bound by the contract with reference to relevant case law.

At the outset it must be determined whether agreement as a contractual basis exists between the parties, as required in terms of the will theory. Agreement has three elements which are:
Agreement as to the consequence the parties wish to create.
An intention to create legal consequences and
Awareness regarding unanimity. In the present case the parties were not in agreement as to the consequence they wished to create since they had different performances in mind. This is a so-called error in corpore. This is a material mistake which excludes consensus between the parties which means that no contract can arise on the basis of the will theory.
However, there the matter does not end because a party may be held contractually liable on the basis of a supplementary ground for liability, namely the reliance theory. According to the direct application of the reliance theory, contractual liability is based on the reasonable reliance

that consensus has been reached with the one contractant creates in the mind of the other contractant.
According to Sonap Petrolium this entails a threefold enquiry:
Was there a misrepresentation regarding one party's intentions?
Who made the misrepresentation?
Was the other party actually misled?
If the other party was misled, would a reasonable man also have been misled? should application of this test result in the conclusion that the contract denier misled the contract enforcer to reasonably believe that the contract denier's expressed intention coincided with his actual intention, the contract denier will incur contractual liability even though he is laboring under a material mistake.
The court also found that fault was not a requirement and apparently did not regard estoppels as a suitable solution in cases of mistake.
According to the indirect application of the reliance theory (iustus error approach) it must be determined whether a contractual party may be held bound to an apparent contract where there is material mistake on his part. If the contract denier's mistake is both material and reasonable, he will not be held bound to the apparent contract. Mistake is usually reasonable where it is caused by the contract enforcer.
(Or where the contract enforcer was aware or reasonably should have been aware of the contract denier's mistake but did not point out the latter's mistake to him) Usually where a party has only himself to blame for his mistake, it is not excusable.
In the circumstances X should not be liable because his mistake was caused by the other party and reasonable steps were taken to clear up the misunderstanding.

Similar mistake question:
John, a racehorse owner, advertises for sale the horse Fire for R1.5 million. In the advertisement it is stated that Fire is an offspring of the legendary July winner, Lightning. Peter is a horse breeder who specifically wishes to introduce the bloodline of Lightning into his stud. He agrees orally with John to buy Fire for R1.5 million. Later, in order to meet the requirements of the horse breeders' association, John has a written contract drawn up which Peter signs without reading. The contract makes no mention of Fire's ancestry, but does contain a clause exempting John from liability for any representations made during negotiations or in the contract. Peter's attention is not drawn to these facts. A month later Peter finds out that Fire is in fact not an offspring of Lightning, although at the time of the conclusion of the contract John genuinely and without any fault on his part believed that to be the case. Advise Peter on whether the contract of sale is valid. Substantiate your advice and refer to relevant case law. Apply the subjective approach of the courts in answering this question. Do not apply the Consumer Protection Act to this question. (10)

The subjective approach of the courts involves the application of the will theory as qualified by estoppel or quasi-mutual assent . A

successful reliance on estoppel can only give rise to a 'fictional' (thus not valid) contract and will thus not be discussed.
The facts seemingly indicate that John and Peter have not reached consensus based on the will theory. If that is the case, it is necessary to determine if Peter may be held bound to a contract with John, based on the reliance theory.
The subjective approach implies that we first have to determine whether agreement between the parties exists as required in terms of the will theory or whether a party acted under a material mistake. Consensus has three elements - the parties must seriously intend to contract, be of one mind as to the material aspects of the proposed agreement (the terms and the identity of the parties to it), and be conscious of the fact that their minds have met.
In the present case the innocent misrepresentation regarding Fire's lineage is irrelevant because it caused a non-material mistake: a mistake regarding a characteristic (the lineage) of the thing sold, Fire (an error in substantia). The parties wanted to buy and sell the same horse, Fire.
The parties were, however, not in agreement as to the consequences they wished to create: Peter did not know that there was a clause in the contract he signed exempting John from liability for any representations made during negotiations or in the contract, but John knew that the sale included an exemption clause. Peter made a mistake as to the obligations the parties wished to create, which excludes consensus between the parties. No contract can thus arise on the basis of the will theory.
The facts of our problem are very similar to that in *Du Toit v Atkinson's Motors*, where the appellant signed an agreement without reading it, which contained a term excluding the respondent's liability for misrepresentation. The court held that the mistake regarding the exemption clause was material.
This type of mistake also occurred in other cases. In *Allen v Sixteen Stirling*, the plaintiff believed that he was purchasing the erf shown to him by the seller's agent, while the written contract that he signed indicated the correct erf which was a completely different property. His mistake related to performance and was material. In *Sonap*, the appellant erred with regard the period of the lease which was an aspect of the performance.
A valid contract could still arise in terms of the doctrine of quasi-mutual assent or direct reliance theory. The court stated the test in Sonap as follows:
In my view, therefore, the decisive question in a case like the present is this: did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention? ... To answer this question, a three-fold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party's intention; secondly, who made that representation; and thirdly, was the other party misled thereby? ... The last question postulates

two possibilities: Was he actually misled and would a reasonable man have been misled?
One of the parties to the contract, Peter, misrepresented his intention to be bound by the contract by signing the contract. Although it could be argued that John was actually misled by this misrepresentation of Peter, it is clear that a reasonable person in the position of John would not have been misled thereby. John knew in fact that there was no exemption clause in the oral contract while the written contract had such a clause. John should have realised that Peter could have thought that the written contract was also without such a clause and he thus had a legal duty to point out to Peter the presence of this clause in the written contract. There was either no actual or at least reasonable reliance on the part of John.
The written contract of sale is invalid because of the lack of actual and apparent consensus.

14. Chantel is on her way from work and sees a white cat hiding in a doorway. Being an animal lover, she takes the cat home with her. The next day, she sees the following advertisement in the newspaper:
"Lost in Johannesburg City Centre on 10 May. Pedigree white cat, female, black tip on her tail. Answers to the name of Peetree. Reward of R6 000 for information leading to safe return. Tel 083 333 3333."
She realises that the cat she found matches the description given. She calls the advertiser who rushes over to be joyfully united with Peetree. In her joy, Peetree's owner, Helen, seems to forget about the reward and Chantel wishes to claim it from her. Will she be successful? Substantiate your answer. (10)

Chantel will only be successful in her claim if a valid contract arose between Chantel and Helen and this will be the case if there was a valid acceptance of a valid offer. Helen's advertisement complies with the requirements for a valid offer:
1) Helen's offer was definite and complete. The offer in this problem contained adequate information to enable the addressee to form a clear idea of exactly what the offeror had in mind as it stated what was required for the offer to be accepted (information leading to the safe return of Peetree) and what amount the reward (R6 000) was.
2) Helen's offer contemplated acceptance and a resultant obligation. Although an advertisement is usually only an invitation to do business (Crawley v Rex) a promise of reward does constitute a firm offer (Bloom). Helen's offer was a firm offer and not a tentative statement with a possible agreement in mind.
3) Helen's offer came to the attention of the addressee, Chantel. The fact that an agreement is a conscious or stated mutuality of consent leads to the requirement that the offeree must have knowledge of the offer to be able to react to it (Bloom)
4) An offer such as a promise of reward can be validly directed at undefined persons. The providing of information by Chantel was a valid acceptance of Helen's offer:

1. **Chantel's acceptance was unconditional and unequivocal.**
2. **Chantel, as a member of the public, could accept the offer of reward because the offer was addressed to the public in general.**

Chantel was aware of the offer of reward and her acceptance was thus a reaction to the offer (Bloom). Chantel's giving of information was a manifestation of her intention to accept the offer. Chantel's acceptance complies with the requirement set by Helen that acceptance must take the form of the provision of certain information.
It can be concluded that a valid contract arose in this problem, because Helen made a valid offer which Chantel validly accepted.

15. P wants to buy an agricultural smallholding from S, who owns several such holdings situated on land a short distance from Johannesburg. During negotiations S points out one of the holdings to P, who decides to buy that particular holding. Unbeknown to P, the written contract of sale subsequently entered into between him and S refers to another of S's holding adjacent to the one he has seen. Is S bound by the contract sale? Discuss with reference to Allen v Sixteen Stirling and other relevant case law.

The answer to the question involves the discussion of mistake, error in corpore, the will/intention theory, the reliance theory, Sonap, Steyn, Potato Board, Atkinson's Motors and Allen, the iustus error, *the* direct reliance and a conclusion (see auction question above).

16. S sold his house to P for R900 000. During the negotiations P asked if the swimming pool was sound and S replied "of course". S did not know that the pool was leaking at the time of the contract but should have realized that it was leaking because big quantities of water had to be added regularly to the pool. After P took occupation of the house he finds that the pool is leaking and that it will cost R30 000 to repair. P does not wish to cancel the contract because she loves the house. She, however, wishes to claim damages from S. Discuss the manner in which damages will be calculated by the court. Refer to Ranger v Wykerd and De Jager v Grunder.

Discuss negligent misrepresentation, define misrepresentation, discuss dolus dans and dolus incidens, and mention the following:
In De Jager v Grunder, the buyer (D) and seller (G) entered into a contract described as a sale but in fact it was an exchange.
The thing 'sold' was G's farm with cattle and equipment and the price 'paid' was D's farm X and Z, including cattle and equipment and a further R7000. To work out the cash amount D paid, they valued all 3 farms. But D made an intentional misrepresentation.
However, the court said that the price paid minus the actual value of the farm was G's damages.

In Ranger v Wykerd, R bought a house with a swimming pool for R22 000.

R asked W if the pool was structurally sound.
W said yes even though he knew it was cracked.
R bought the house and the pool leaked.
He had to pay R1 250 in repairs.
R sued W for R1 250.
He further said that he would have paid R20 750 for the house had he known the truth about the cracked pool.
The court said that the reasonable amount paid for pool repairs is generally R1 000.

17. Mkhabela, a government institution, which was the owner of certain immovable property in a township, mistakenly accepted the tender submitted by Yello to purchase a certain erf in the township. The board of Mkhabela actually decided to accept the tender submitted by Zorro, but the manager of Mkhablea, who is responsible for the conclusion of contracts on behalf of Mkhabela, by mistake sent the letter of acceptance to Yello. Yello incurred expenses to perform in terms of the contract. However, Mkhabela later realized its error and averred that it was not bound to perform in terms of the contract because the manager had not been authorized to accept Yello's tender. Discuss Yello's position with reference to *National and Overseas v Potato Board* and other relevant case law. (10)

Start your discussion with an explanation of the primary basis of contractual liability – the intention/will theory; explain how all material mistakes, in terms of this theory, render the contract void.
Then discuss alternatives to the will theory and the only viable one is the reliance theory. There are 2 legs to this theory:
Direct reliance approach:
Mkhabela misrepresented his actual intention to contract with Zorro by accepting Yello's tender. Yello was actually misled by Mkhabela's misrepresentation as to Mkhabela's intention to contract with Yello. A reasonable man would also have been misled by this misrepresentation of Mkhabela
Yello's reliance was therefore reasonable.

Mkhabela, a party to the apparent contract, made a misrepresentation regarding his own true intention. By accepting Yello's tender he made a misrepresentation that he wished to contract with Yello. Yello was actually misled by this misrepresentation and a reasonable man in Yello's position would also have been misled, because there is no indication that something was amiss and that Mkhabela actually wished to contract with someone else. Yello's reliance is therefore reasonable and Mkhabela is bound by the contract.
OR
Iustus error approach:
Mkhabela's mistake is unreasonable as Yello did not know of Mkhabela's mistake nor could he, as a reasonable man, have known of it.
Mkhablea is the author of his own error.

Mkhabela's error is material, but unreasonable. Yello did not know that Mkhablea was acting under an error. A reasonable man would also have not known as there was no indication that Mkhabela was acting under a mistake, nor did Yello cause Mkhabela's mistake through a misrepresentation. Yello is thus bound by the contract.

18. X and Y concluded a written ***contract*** of sale of immovable property in which the description of the property was so deficient that it didn't comply with statutory requirements regarding the description of the property in such deed of sale. Y Alleges that the sale is void for lack of compliance with the statutory formalities. While X wants to uphold the ***contract***. Discuss with reference to 'Magmwza v Heenan'. (10)

It often happens that parties are fully agreed on terms of their contract, but that these terms are later, by mistake inaccurately expressed in a written instrument. Such cases are not, of course, cases of mistake properly so called. In these cases consensus is undoubted & real & either party may apply for rectification of the written document to bring it in line with the actual intention of the parties.

This flows from the generally subjective approach of our law to the basis of contractual liability. What is rectified is not the contract itself as the juristic act, but the document in Question, because it doesn't reflect what the contractants intended to be the content of their juristic act.

In general the courts require that a party claiming rectification must establish the following:

1. **that as result of an error or mistake the document doesn't reflect the common intention of the parties,**
2. **it must be established what the true intention of the parties was &**
3. **How the doc is to be changed to reflect that intention.**

Determining the true intention of the parties is a Question of fact. Proof of a prior agreement, which in it self need not constitute a contract, is sufficient.

<u>Magwaza v Heenan:</u>
The court held that the agreement could not be rectified as it was void due to non-compliance with Sec 1(1) of the Act (which has since been replaced by the Formalities in respect of Contracts of Sale of Land Act).
The facts were: Contract for sale of land; Buyer alleged that the written contract contained an incorrect description of the property in that it described the property as being smaller than it was. He therefore sought an order rectifying the contract so as to reflect the parties' true intentions.
The issue was whether in the prop was so inadequately described as to result of voidness, and whether such voidness precludes a claim for rectification.
The judge held that the test with the compliance with the act is whether the contract sufficiently describes the subject matter sold to enable

identification of it. In casu, the contract doesn't sufficiently describe the land as to make it capable of identification. The contract is therefore VOID unless the parties intended the determination of the unspecified borders to be left to someone (such as the surveyor). In my opinion there is no identification that such a person was to determine the borders. The contract is therefore a nullity. Since the contract is a nullity there is nothing to rectify.

X can apply for rectification but I doubt he will succeed since the written contract of sale goes against the statutory formalities.

19. S sells his farm to P for R100000. There is a pine plantation on the farm and P purchases the farm for the purpose of growing and selling pine wood. During negotiations S points out the boundaries of the farm to P and includes a piece of land 300 square meters. Which in actual fact is part of an adjoining farm, with the purpose of persuading P to conclude the ***contract***. S knows that the piece of land isn't part of his farm. The market value of the farm is R900000. P would only have been prepared to pay R800000 if she had known the true state of affairs. Discuss all the remedies which P possibly may have. Refer to 'Trotman v Edwick' and 'Phame v Paizes'. (10)

Misrepresentation:
It's an untrue statement of fact made by 1 party to the other during negotiations which induces the other party to enter into a contract he would:

1. **Never have entered into had he known the truth or**
2. **Would have entered into but on other terms.**

A fraudulent misrepresentation is one made

- **Knowingly, or**
- **Without belief in its truth, or**
- **Recklessly, careless whether it should prove to be true or false.**

It is one made without an honest belief in its truth.
A negligent misrepresentation is one made honestly, but carelessly. An innocent misrepresentation is one made without fraud or negligence.
<u>AMENDMENTS 2012</u>: When a statement of fact is made during the course of pre-contractual bargaining, or is embodied in a contractual document (eg: 'the car is a 1985 model'), it is often a nice question whether the statement is a mere representation, or a warranty – that is a term of contract. Test for distinguishing warranties from representations focuses on the intention of the parties: did they intend the statement to form part of their contract; in other words, that there should be a contractual liability in respect of it?
In determining the intention of the parties, the court is guided by objective criteria such as: the importance of the truth of the statement; the stage of the transaction at which it was made; and whether it was made in response to a query by the representee. Even in the absence of a genuine animus contrahendi, a person may be held to have given a warranty, on the basis of

estoppels or the principle in Smith v Hughes, if he or she led the other part reasonably to believe that he or she was warranting the truth of his or her statement.
A warranty is a term, its breach gives rise to the usual remedies for breach of contract (cancellation of the contract (where the breach is material) and damages). (Positive interest)
(If misrepresentation made prior to the conclusion of the contract is subsequently incorporated into it as a contractual term, the representee may sue either for misrepresentation or for breach of contract.)
Mere expressions of opinion, usually amount to misrepresentations. However, if the speaker does not in fact hold the belief or opinion which he or she expresses, or lacks the will to give effect to his or her statement of intention when he or she makes it, he or she misrepresents his or her own state of mind; and for this he or she may be held liable.
A statement of law has been considered to be one of opinion, rather than fact, and therefore not actionable. A statement as to the legal effect of a document is one of law; but where a party induces another to enter into a contract by representing that he or she places a particular construction upon a clause in the document, he or she will be bound by that construction, even if it is not the legally correct one.
A contracting party who has been misled into contracting by the misrepresentation of the other party may in appropriate circumstances set the contract aside and claim restitution, or raise the misrepresentation as a defence when sued upon the contract, and is in addition entitled to recover damages for any losses caused by the misrepresentation.
<u>Rescission and restitution</u>
Where a party has entered into a contract after a misrepresentation has been made to him or her, such a party is entitled to rescission and restitution, provided that the following four criteria are met:

1. **Misrepresentation by the other party: The misrepresentation must have been made by the other party to the contract, or by someone for whose acts he or she is responsible.**
2. **Inducement: No Relief will be granted if the representee knew that the statement was false, or if it failed to come to his or her notice. The test for inducement is a subjective one.**
   Two types of fraud inducing a contract: dolus dans and dolus incidens. If, but for the fraud, the contract would not have been concluded at all, it is dolus dans; if there would have still been a contract, but on different terms, it is a dolus incidens.
   Incidental fraud (dolus incidens) gives a right only to damages, and not to rescission of the contract.
3. **Intention to induce: misrepresentation should be made with the intention of inducing the other party to enter into the contract. If the unreasonable reliance by the representee was reasonably foreseeable to the represent or, rescission should be permitted.**
4. ***Materiality***

Materiality, the misrepresentation must be material in order to afford a right to rescind. The misrepresentation should be of such a nature that is would have the natural and probable effect of inducing a reasonable person to enter into the contract.

Fault not required. **The right to rescind a contract induced by misrepresentation exists irrespective of whether the statement was made fraudulently, negligently or innocently.**

Misrepresentation may constitute an invalidating cause no less than a cause of action: whenever a representee may rescind a contract for misrepresentation, he or she may also use the misrepresentation as a defence to an action on the contract brought against him or her by the representor.

Damages

Whether the representee chooses to cancel or to abide by the contract, he or she may in addition be entitled to recover damages in respect of any patrimonial loss caused by the misrepresentation.

1. ***Fraudulent misrepresentation. Action legis Aquiliae.***

The five essential elements of the cause of action are as follows:

1.1. A representation;

1.2. Which is, to the knowledge of the representor, false;

1.3. Which the representor intended the representee to act upon;

1.4. Which induced the representee to act; and

1.5. That the representee suffered damage as a result.

The motive of the representor is irrelevant; provded only that he or she made the assertion without an honest belief in its truth and intended it to be acted upon, it matters not that he or she lacked an intention to cause loss or damage to the representee; but such damage must have followed as a result of the representee acting upon the misrepresentation.

Such intention need not always be *dolus directus* – that is, the representor need not have applied his or her will to induce the representee to act upon the representation. It is sufficient if he or she subjectively forsaw such a result and was reckless as to whether the result followed or not.

The right to claim damages for fraud is not dependant on the materiality of the representation; it is no defence that the representee should not, as a reasonable person.

Since fraud is delict, the measure of damages is the usual delictual rather than the contractual measure. (*Trotman v Edwick)*

The victim of fraudulent misrepresentation is thus entitled to be put in the financial position he or she would have occupied had the representation not been made to him or her, but he or she cannot have the representation 'made good' by being put in the position he or she would have occupied had the representation been true. Whether the contract is rescinded or upheld, damages are recoverable in respect of the consequential losses flowing from the fraud. Where the contract is rescinded and restitution ordered, the representee's loss on the transaction itself is generally wiped out by the process of restitution and his or her damages are thus usually limited to

wasted costs and other such consequential losses. Where the contract is upheld, the representee may suffer a loss on the transaction itself.

To be compensable, the loss in question must be casually connected with the fraud. In a case of *dolus dans,* there would have been no contract at all but for the fraud.
This entails awarding the innocent party the value of his or her performance, less any benefits which he or she has received from the other party under the contract. In a case of sale, for example, his or her net loss is the price paid for the merx, lessits actual or fair value at the time of purchase. Both losses and benefits have to be taken into account, since both flow directly from the misrepresentation; thus if, in spite of the misrepresentation, the representee has made an overall profit on the transaction, he or she is not entitled to any damages – the so-called swings-and-roundabouts principle (*Ranger*).
Eg: If he or she paid R800 000 for a house worth R900 000, and he or she would not have brought at all but for a misrepresentation that the house had recently been rewired, he or she cannot recover the R20 000 that it has cost to rewire the house, since what he or she loses on the swings (R20 000) is more than compensated by what he or she gains on the roundabouts (R100 000).

In a case of *dolus incidens,* where the effect of fraud was merely to influence the terms of a contract which would in any event have been concluded, the representee's loss cannot be measured by comparing the values of the respective performances of the parties, since neither was fully induced by the representation. Rather one should measure the extent to which the representation inflated the performance that the representee was prepared to make under the contract.
Eg 1: Bad bargainer: A offers to buy something worth R100 from B for a price of R120; B makes a misrepresentation which, if true, would make the thing worth R150; A then buys it for R180. The loss caused by the misrepresentation is not R80 (price paid less actual value) but R60 (price paid less price that would otherwise have been paid); the additional loss of R20 (putative price less actual value) would in any event have been incurred due to A's bad bargaining.
Eg 2: Good bargainer: the damages awarded may exceed the difference between the price paid and the actual value of the merx, since they include an element of loss of profit (*lucrum cessans*). In the example given above, if A's initial offer was less than the actual value of the thing, say R90, and his or her final, accepted offer after the misrepresentation was R135, then the representee can recover not just R35 (price paid less actual value) but R45: The additional R10 represents the profit that he would have made but for the misrepresentation. This is not the same as awarding him or her contractual damages, which would here be R50 (difference between the represented and the actual value of the merx: R150 less R100).

In *Ranger's case,* it was held that where a thing is misrepresented to be free from defects, the damages may be measured by the cost of removing the

defect. With respect, it is submitted that, despite the obvious practicality of such an approach, it amounts to making the representation good; that is the contractual measure.

The decision in Bayer SA v Frost placed the remedies for intentional and negligent misrepresentation on an equal footing.
Since a culpable misrepresentation is a delict, the measure of the misrepresentee's damages is the normal delictual measure and that is that damages are calculated according to the plaintiff's negative interest.
That means that the misrepresentee must, by the award of a sum of money, be placed in the hypothetical (assumed) position in which he would have been had the delict not occurred.
He can never claim to be placed in the position in which he would have been had the misrepresentation been true.
A rule of thumb is always to decide how much worse off the misrepresentee is financially as a result of the misrepresentation.
Where the contract is rescinded restitution takes place and the misrepresentee's loss will normally take the form of wasted costs which he may have incurred in connection with the conclusion and cancellation of the contract. Whether such reimbursement may be regarded as damages proper or merely part of restitution itself is not clear but this distinction will be of little importance in most cases.

20. Samuel, a jeweller displays 2 seemingly identical rings in his shop window. The 1 contains diamonds and the other only crystals. Pat walks into the shop, points out the crystal ring to Samuel and offers to buy it for R10000. Nothing is said about the material from which the ring is made. Pat thinks she is buying a diamond ring, while Samuel believes that Pat wants to buy the crystal ring. Samuel accepts Pat's offer.

(a) Does a valid contract arise? Discuss (5)

For a mistake to be material it must relate to 1 or more of the following:
Consensus exists when parties:

1. **The intention to be legally bound.**
2. **The persons between whom the obligations are to be created &**
3. **The performances to be delivered in terms of the contract.**

If for some reason or other the parties are not in agreement regarding 1 or more of these elements of consensus actual agreement between them is excluded & there is a material mistake.

In the given set of facts the mistake is not material since Pat's mistake is 1 of error in substantia (error in qualitate) or mistake regarding an attribute or characteristic of the subject matter of the contract. Thus the contract is valid.

(b) Does Pat have any other remedy available against Samuel besides possibly having the contract declared void? Discuss. (7)

Misrepresentation:
It's an untrue statement of fact made by 1 party to the other during negotiations which induces the other party to enter into a contract he would:

1. **Never have entered into had he known the truth or**
2. **Would have entered into but on other terms.**

Remedies:
Rescission & restitution: victim granted this.

1. **Dolus dans is if there was no misrepresentation, there would be no contract.**
2. **Dolus incidence is if there is a misrepresentation, there would be a contract but under diff terms.**

Damages:
Test in case of Dolus Dans:
If no misrepresentation – no contract.
Loss determined by deducting value of performance made by misrepesentor from that made by misrepesentee & adding to the difference any consequential loss (loss of profit) the misrepesentee may have suffered. (Trotman v Edwick).

Test in case of Dolus Incidens:
If no misrepresentation – still enter contract but on different terms.
Loss determined by deducting value of performance that misrepesentee would have been prepared to render had there been no misrepresentation, from performance that misrepesentee actually rendered, & adding any consequential loss that the misrepesentee may have incurred.
Misrepesentee must proof that contractants would have agreed to the putative performance. Misrepresentee is free to prove any putative price even 1 less than market value of the performance.
(De Jager v Grunder).

In the given set of facts P can rely on dolus incidence to avoid making the contract void. (ADD INFO AS ABOVE FROM AMENDMENTS FOR 2012 FROM Q19)

(c) Would a valid contract arise if both Samuel and Pat believe that they are contracting for the diamond ring? Discuss with reference to 'Dickinson Motors v Oberholze'. (8) ***OCTOBER 2015 EXAM Q!!!!!***

This relates to common error:
This is another type of mistake which render the contract void. This is the case where both parties make the same mistake. The parties are in complete agreement. Each knows the intention of the other & accepts it; each is mistaken about some underlying & fundamental fact.

A Common Error results in the contract being void but not for lack of consensus. The parties are in complete agreement.

<u>Relevant case law: Dikinson's Motors v oberholzer:</u>
FACTS:
O's son X bought 2 cars on higher-purchase.
Car A was bought from D Motors & car B from a 3rd party.
X agreed with O to exchange car B for O's car.
D Motors took judgment against X for the balance owing on car A & attached car B (still in O's possession) in the mistaken belief that it was car A.
O, unaware of the error, agreed to pay outstanding amount in return for possession of the car.
Both D Motors & O believed the car to be car A, while in fact is was car B.
Soon after O regained possession of the car, the 3rd party removed the car after obtaining judgment for outstanding amounts owing.
O sued D Motors for the sum he had paid to D Motors.

HELD:
O paid amount under common mistake (that the car in Q was the 1 which D Motor's had sold to X), & had the parties been aware of the true nature the contract would not have been concluded.
O was entitled to recover from D Motors the $ he had paid owing to common error.

21. Discuss undue influence with reference to "<u>Preller v Jordaan</u>" (10)

In <u>Preller v Jordaan</u> (reaffirmed in <u>Patel v Grobbelaar</u>) it was held that where a party to a contract requests a court to set aside the contract on the ground of undue influence, an onus rests on that party to prove:

1. **That the other party exercised influence over him.**
2. **That this influence weakened his powers of resistance & made his will pliable.**
3. **That the other party exercised this influence in an unscrupulous manner in order to induce him to consent to a transaction which firstly was to his detriment & secondly, which he with normal free will would not have concluded.**

If the person who holds a position of trust in such a relationship, takes advantage of the trust placed in him in order to influence the other party into entering into a contract with him, & in so doing obtains a benefit which he would not enjoy were it not for the relationship of trust existing between them, it is accepted that he has exercised Undue Influence on the other party. The contract may then be rescind at the insistence of the innocent party.

Undue Influence renders a contract voidable at the instance of the aggrieved party. Rescission & restitution are traditionally the only remedies available on this ground.
Should the aggrieved party decide to rescind the contract the obligations between the parties will be terminated with retrospective effect. This means that the parties must restore to each other what has already been performed in terms of the contract so that they may be in the position that they were before the contract was concluded.
Preller v Jordaan:
J an elderly farmer donated & transferred 4 farms to Dr.P. J claimed retransfer of the farms alleging he had been influenced into transferring the farms. J alleged that at the time that the agreement was concluded, he was old & ill & physically & mentally exhausted. J further alleged that he would not have given transfer to Dr.P had Dr.P not exerted Undue Influence upon him in his exhausted state. P excepted to the allegations, averring that Undue Influence wasn't a ground for setting aside the transaction.
P's exception could not succeed. J's claim upheld.
The allegations in Plaintiff's declaration are sufficient to base a claim for undue enrichment.
Of the 4 farms 3 had been donated by Dr.P to his children. Since P had the intention to pass ownership to his children, the court found that ownership had indeed passed. J could therefore only recover 1 of the farms, because the children had no part in the Undue Influence.

22. X wants a car just like the one his neighbor Y has. X knows that Y cheats on his income tax since Y often boasts of this. Consequently, X tells Y that if Y does not sell his car to him for R20 000, he will report Y to the receiver of revenue. Y sells his car to X for the amount mentioned although it is worth R100 000. Will Y be able to have the contract set aside? Discuss with reference to relevant case law.

Duress occurs when a party is forced or compelled by the other party or someone for whose acts he may be held liable to enter into a contract.
The requirements as set out in Broodryk v Smuts are:
Actual violence or reasonable fear
The fear must be caused by the threat of some considerable evil to the contractant or his family. It must be the threat of some imminent or inevitable evil. The threat or intimidation must be contra bonos mores. The moral pressures used must have caused damage.
In the present case the contract was concluded pursuant to a threat of otherwise lawful action. Generally, to report someone for not paying income tax is not unlawful. There is diversity in the provincial divisions regarding the possible wrongfulness of such action. In the Transvaal it has been decided that such contracts are not necessarily contra bonos mores.
In the cape it has been held that such agreements generally are unenforceable.
It appears that a threat of otherwise lawful action, such as prosecution, in fact will be unlawful if it is used by a contractant to exact a performance

which is more advantageous than that to which he is reasonable entitled. On this basis Y will probably be able to have the contract set aside and claim restitution.

23. X wants to conclude a lucrative contract with company Y. To ensure that he is successful, X agrees with the agent of Y, who is responsible for concluding contracts on behalf of Y that for a fee the agent will ensure that the contract will be awarded to X. After the contract has been concluded between X and Y, and both parties have performed, the financial director of Y discovers how X secured the contract. Discuss the implication of both the agreement between X and the agent of Y and the agreement between X and Y. You must also discuss whether Y has a remedy in the circumstances and how it is to be exercised. (15)

A contractant would plead any facts which support the conclusion that his consent was obtained improperly.
Improper conduct, according to the courts, would amount to wrongful conduct in the delictual sense.
The delictual concept of wrongfulness should be used as a guideline by which the limits of recission should be defined.
The element of wrongfulness is flexible enough to provide the basic limits for liability and still accommodate the extensions of delictual liability.
In Plaaslike Boeredienste v Chemfos, the Appellate Division went beyond the existing grounds for rescission in considering a claim for rescission of a contract. Here, the contractant had bribed the agent of the other contractant to persuade the latter to conclude a contract. Although fraud (intentional misrepresentation) was advanced as the ground for rescission, the court held that the act of persuasion through bribery did not constitute fraud as such but amounted to an improper means of obtaining consensus. According to authors, the approach adopted by the court indicates that the AD seems to have restarted the grounds for rescission in terms of the underlying general principle that a contract may be rescinded by a contractant whose consent to it was obtained by improper means. This raises the possibility that the traditional grounds for rescission may be called one general ground.
In Extel v Crown Mills, the SCA was confronted with a contract engineered by the bribery of the principal's agent by the other contracting party. The court, approving the Chemfos decision held that in such cases of commercial bribery the agreement between the briber and the person bribed is void for want of legality, while the ensuing agreement between the briber and the innocent contracting party is voidable at the instance of the innocent party.

The court did not however find that the existing grounds for the rescission of a contract in this context have been included under one general ground. The court confirmed that commercial bribery is a distinct ground for rescinding a contract and that it has the following elements:

- **A reward**
- **paid / promised**
- **by one party – the briber**
- **to another – the agent**
- **who is able to exert influence over**
- **a third party**
- **with the intention that the agent**
- **should induce the principal**
- **without the latter's knowledge and**
- **for the direct or indirect benefit of the briber**
- **to enter into or maintain / alter a contractual relationship**
- **with the briber / his principal /associate / subordinate.**

24. State the questions which the court formulated in "Basson Case" to determine the reasonableness of an agreement in restraint of trade. (4)

In the Basson Case the following 4 Questions in order to determine the reasonableness of an agreement in restraint of trade was established:

1. **Is there an interest of the 1 party that deserves protection?**
2. **Is such an interest affected by the conduct by the other party?**
3. **If so, does such interest weigh up qualitatively & quantitatively against the interest of the other party (to be economically active & productive) to the extent that this party can't be economically active & productive?**
4. **Is there another facet of public policy having nothing to do with the relationship between the parties but which requires that the restraint should either be maintained or rejected?**

If the interest in (3) surpasses the interest in (1), the restraint would as a rule be unreasonable & accordingly unenforceable.

25. X concludes an apprenticeship contract with Y for a training period of 2 years. In terms of the contract X isn't allowed to work in the village for a period of 12 months after the termination of the contract. X wishes to start a hairdressing business of her own at the end of her training period. She decides to contest the restraint of trade clause. Advise X fully. Refer to "Magna Alloys Case" and other relevant case law. (15)

2 Principles come into conflict when determining the public interest in agreements in restraint of trade. Although public policy requires that agreement freely entered into should be honored (Principle of Sanctity of contract), it also requires, that everyone should be free to seek fulfillment in the business & professional world (Principle of Freedom of Trade).

In Magna Alloys the Sanctity of contract takes precedence over Freedom of Trade. The result of this is that a contract of restraint is regarded as valid & enforceable unless the party wishing to escape the consequences of the

agreement can prove that the restraint should not be enforced because it's contrary to public policy.
Court held in Magna Alloys that the test is whether an agreement in restraint of trade is contrary to public policy, in which case its not invalid (or void), but only unenforceable. Court thus gives precedence to the principle of Sanctity of contract over Freedom of Trade.
A Restraint of trade is contrary to public policy if the restraint is unreasonable. Reasonableness or otherwise of a restraint is judged on the basis of the broad interests of the community & the interests of the contracting parties themselves.
Broad interests of the community concerns the principle of the Sanctity of contract & of Freedom of Trade. Interests of the contracting parties involves the interest/s which the 1 party is trying to protect with the restraint, & the interest which the other party has in freely participating in the commercial & professional world.
Public policy, & not the reasonableness of a restraint as between the parties, is the measure to determine whether a restraint should be enforced. The fact that a restraint is unreasonable as between the parties is only an indication that the restraint could be against public policy.
There may be another facet of public policy that may require that a reasonable restraint should not be enforceable or that an unreasonable restraint should be enforceable.

<u>In the Basson Case the following 4 Questions in order to determine the reasonableness of an agreement in restraint of trade was established:</u>

1. **Is there an interest of the 1 party that deserves protection?**
2. **Is such an interest affected by the conduct by the other party?**
3. **If so, does such interest weigh up qualitatively & quantitatively against the interest of the other party (to be economically active & productive) to the extent that this party can't be economically active & productive?**
4. **Is there another facet of public policy having nothing to do with the relationship between the parties but which requires that the restraint should either be maintained or rejected?**

If the interest in (3) surpasses the interest in (1), the restraint would as a rule be unreasonable & accordingly unenforceable.

<u>Onus of proof:</u>
Acceptance of public policy as the criterion means that the principle of Sanctity of contract is given preference over Freedom of Trade & that when a party alleges that he isn't bound by a restrictive agreement to which he has agreed, he bears the onus of proving that the enforcement of the agreement would be contrary to the public policy (<u>Magna Alloys</u>).

- **Here Y probably had a protectable interest (good will), & X might have came into contact with them & formed a personal relationship. The fact doesn't state where X wants to open her hairdressing shop, but if she wants to open it in the Village it might have a qualitative l &**

quantitively affect on Y's business. It doesn't seem that there is another facet of public policy that may indicate that the restraint should be maintained or rejected. It's on X to prove that the restraint is contrary to the public policy.

26. Discuss the rule in pari delicto potior est condition possidentis with reference to Jajbhay v Cassim 1939 AD 537.

The illegality of a contract results in it either being void or unenforceable. Neither party may institute an action on the basis of an illegal contract. The possibility does exist that a party who performed in terms of an illegal contract may claim restitution with an enrichment action.
However, the rule in pari delicto potior es conditio possidentis prevents an action for restitution in certain circumstances. This rule has the effect that where parties to an illegal contract are both guilty, the party who is in possession of a performance which has been delivered is in the strongest position. However, where a party did not act disgracefully in performing he is not precluded from claiming restitution with an enrichment action.
Until 1939 the courts applied the par delictum rule rigorously and allowed no exceptions. For example in Brand, which concerned the sale of a cow on a Sunday, the court refused to allow the plaintiff any redress.
In Jajbhay the law on this point was reconsidered. In this case the parties concluded an illegal sub-lease but the application was denied on the grounds of the par delictum rule.
However the court did indicate that the par delictum rule could be relaxed in appropriate circumstances in order to allow restitution. This rule rests on considerations of public policy, namely to discourage illegal transactions. Nevertheless, public policy also requires that justice should be served and the par delictum rule may be relaxed where "simple justice between man and man" so requires. Thus it will depend on the particular circumstances of a case whether this rule will be relaxed or not.

27. State the test to decide if a restraint of trade clause is enforceable. (5)

In *Magna Alloys and Research (SA)(Pty) Ltd v Ellis,* the Appellate Division overturned this approach in favour of the sanctity of contract. A contract in restraint of trade is now valid and enforceable, unless the party wishing to escape the consequences of the agreement can prove that the restraint is contrary to public interest and thus unenforceable.
The restraint denier consequently bears the onus of proving that the enforcement of the agreement is contrary to policy. The court also held that an agreement in restraint of trade that is contrary to public policy, is not void, but only unenforceable

28. X, Y & Z buy S's car for R300000. The parties agree that the car must be delivered immediately and that the price only be paid in a week's time. S delivers the car immediately, but the price isn't paid after a week's time. S

claims R300000 from X. X's defence is that S must claim R300000 from X, Y and Z. Discuss X'' defence. (5)

Joint & Several Liability:
This is normally acknowledged only if parties have contracted to be bound as debtors, liable both jointly & severally. In this case each of the joint (or solitary) debtors is liable for the full amount of the debt that is the creditor can hold anyone of the debtors fully liable. If he so chooses, however, the creditor can recover a portion of the debt from each of the debtors. If 1 of the debtors so liable pays the full amount of the debt, the other debtors are, of course, completely relieved of liability to the creditor.

If 1 of the debtors pays the full debt & obtains cession of the creditor's claim, he can then hold the other debtors liable. Even without a cession, there is authority for the view that he has a similar right of recourse against the other debtors. The debtor's right of recourse will furthermore depend on the underlying relationship & any special contractual term or term implied by law.

29. Explain briefly what you understand by the Parol Evidence Rule. (6)

Parole Evidence Rule:
Dispute about the contents of the agreement arises often. To settle such a dispute, the agreement must be interpreted in accordance with the rules set out for the interpretation of contract s. But where the contract is embodied in writing, whether writing is required by law or the parties themselves have stipulated writing, the Question becomes even more difficult. In terms of the parole evidence rule, the written document is the only admissible evidence about its contents that is the terms of the written agreement. No extrinsic evidence (this is evidence going beyond the written document evidencing the contract) of other agreements may be adduced to indicate that the agreement was different or to explain precisely what the parties intended.

30. Discuss "*Goldblatt v Fremantle*". (5)

F undertook (orally) to supply G lucerne at intervals. The parties agreed that F would reduce their oral agreement to writing and that G would confirm it in writing. F would set out the terms of their agreement in a letter and asked G to confirm the terms in writing. When G failed to do so, F stopped supplying G with lucerne. G claimed contractual damages from F. The Appellate Division held that no contract existed because the parties intended their agreement to be concluded in writing, which also signing by both parties.
The intention of the parties with regard to what 'in writing' means, is of course decisive, but in the absence of the evidence about their intention, the conclusion of an electronic contract that complies with the

requirements of s12 of the Electronic Communications and Transactions Act should usually comply with the stipulated formality of writing.

31. X claims R1000 from Y. Y denies that he owes X any thing but nevertheless sends him a cheque for R250 saying that the cheque offered is "in full settlement and to avoid litigation". X deposits the cheque and then institutes action for the R750. Can X successfully institute action against Y?

If the debtor tenders anything else its not due performance & may be refused by the creditor. On the other hand, if the creditor accepts it, the debtor is conditionally released. This is known as in solutum datio.
In solutum mustn't be confused by novatio (novation). The same applies to payment in full.

In these facts the courts usually confer from such a phrase that Y is making an offer to X, that is an offer to pay R250 in full settlement of his debt to X & X may therefore only accept the cheque subject to the condition which Y has made. If X should deposit the cheque in his bank account & thereafter write to Y stating that he has accepted the cheque as partial settlement only, he can't enforce payment of the balance of R750.

Would the position have been any different if Y had said in his letter: "I owe you R250 only? My cheque for this amount is enclosed"? Discuss.

Yes the situation would be different.
X can now safely accept the money & still hold Y liable for the balance, since Y has made no offer but merely denied that he owes the sum of R750.

32. Sam has been leasing commercial property from Zeek for the past 4 years. The lease will come to an end on 31 January 2011. On 5 November 2010 Sam phones Zeek and offers to renew the lease for a further 4 years and then Zeek accepts. During the call, the material terms of the renewal agreement are agreed upon and Sam and Zeek agree also that the material terms must be reduced to writing and signed by both parties. Then on the 5th of December, Sam is shocked to receive a letter from Zeek, advising Sam that there will be no renewal of the lease and that Sam should vacate the leased property on 31 January 2011. Sam and Zeek never reduced their oral agreement to writing. Advise Sam if a binding agreement with Zeek exists, for the renewal of the lease for a further 4 years. Refer to Goldblatt v Freemantle 1920 AD 123 in your answer.

Formalities stipulated by the parties
Creation of the contract
The parties to an oral agreement will often agree that their agreement should be reduced to writing, and perhaps also be signed. In doing so, they may have either of two very different purposes in mind.

1. **The parties may wish to have a written record of the agreement merely to facilitate proof of its terms. If so the agreement is binding even if it is never reduced to writing.**
2. **Alternatively, the parties may intend that their oral agreement will not be binding upon them until it is reduced to writing and signed by them. In this case, the prior oral agreement lacks contractual force and will become a contract only if or when there is compliance with the stipulated formalities. Neither party can compel the other to sign the agreement.**

The leading case is Goldblatt v Fremantle. F undertook (orally) to supply G lucerne at intervals. The parties agreed that F would reduce their oral agreement to writing and that G would confirm it in writing. F would set out the terms of their agreement in a letter and asked G to confirm the terms in writing. When G failed to do so, F stopped supplying G with lucerne. G claimed contractual damages from F. The Appellate Division held that no contract existed because the parties intended their agreement to be concluded in writing, which also signing by both parties.
The intention of the parties with regard to what 'in writing' means, is of course decisive, but in the absence of the evidence about their intention, the conclusion of an electronic contract that complies with the requirements of s12 of the Electronic Communications and Transactions Act should usually comply with the stipulated formality of writing.

33. Y sold a plot to X that bordered on a stream. The parties understood that X specifically wanted the plot because there were pumping rights in respect of the stream but a clause to that effect was not inserted into the contract. The parties merely assumed that pumping rights did exist. Later X discovered that there were, in fact, no pumping rights. Discuss whether X is bound by the contract with reference to *Fourie v CDMO Homes (Pty) Ltd 1982 (1) SA 21 (A) (10)*

The facts coincide to a large extent with Fourie v CDMO Homes (Pty) Ltd which dealt with a supposition
If the parties render their agreement dependent on an uncertain event of the past or an uncertain position in the present, one is dealing with a supposition. In such an instance there are no obligations subject to a condition.
Either there are no obligations altogether, or wholly unconditional obligations, depending on the correctness of the supposition.
If the supposition is correct performance may be claimed and the contract is completely valid. If the supposition is incorrect neither party can hold the other contractually liable. Any motive of the parties may be made a term of their agreement, but it must still be a term of their agreement, whether express or implied. A motive for concluding a contract does not qualify as a supposition: the motive must have formed the basis of their

contract. In the case of a tacit supposition one often is dealing with a so-called common error or mistake.
In such an instance the parties are in complete agreement which the contract rests. In the present case the contract will be void because of an incorrect supposition as was decided in the Fourie case.

(a) Y let premises to X. the lease contained a clause prohibiting X from subletting the premises without the written consent of Y. A further clause of the lease required that any variation of the terms of the lease had to be in writing and signed by both parties. Later Y told X that he could sublet a portion of the premises. After X had sublet a portion of the premises to a third party, Y changed his mind and informed X that both X and the third party must vacate the premises because X had breached the contract. Discuss X's position with reference to *SA Sentrale Ko-operatiewe Graanmaatskappy Bpk v Shifren 1964 (4) SA760 (A).*

They correspond to a large extent with SA Sentrale Ko-operatiewe Graanmaatskappy Bpk v Shifren. The question is whether parties may orally deviate from a written agreement which contains a clause which determines that the contract may only be varied or terminated in a specific manner. (A so called non-variation clause)
In such instances the parties have actually set formalities for the amendment or termination of their contract. The parties to a contract may also prescribe certain formalities for any variation of their contract. In fact, it has become an extremely common practice to insert an non-variation clause in any written contract, the standard wording being more or less as follows: 'No variation of this agreement shall be of any force or effect unless reduced to writing and signed by the parties to this agreement'.
SA Sentrale Ko-operatiwe Graanmaatskappy Bpk v Shifren. Court held non-variation clause was not against public policy and that no oral variation of the contract was effective if the clause entrenched both itself and all the other terms of the contract against oral variation. The purpose of the clause was to prevent disputes and problems of proof that might otherwise arise if oral variations were permitted; and it operated in favour of both parties.
The application of the Shifren principle can produce results that appear to be unjust. E.g: A landlord may orally agree that the tenant can pay the rent late, but then later cancel the contract on this ground, relying on the non-variation clause. This has led many courts over the years to attempt to soften or even circumvent the Shifren principle by invoking doctrines relating to waiver etc.
More recently, the courts (SCA) have reaffirmed its earlier decision in Shrifren in the case of Brisley v Drotsky. A non-variation clause operated for the benefit of both parties and does not detract from constitutional considerations of equality.

(b) Assume that X and Y did sign a variation of the lease allowing X to sublet a portion of the premises and thereafter Y changed his mind anyway and

prohibited X from subletting. Discuss X's position with reference to *Tuckers Land and Development corporation (Pty) Ltd v Hovis 1980 (1) SA 645 (A)*.

In this instance Y clearly acts contrary to the agreement between the parties and commits breach of contract in the form of repudiation.
This form of breach occurs when one party conducts himself in such a manner that the other party can conclude with reasonable certainty that the former will not discharge his obligations in terms of the contract.
However, this does not mean that the guilty party must have the subjective intention to put an end to the contract.
According to the Tuckers decision an objective test is applied.
The question is whether the repudiating party conducts himself in such a manner that a reasonable person would conclude that he does not have the intention to honour his part of the contract. In the Tuckers decision the seller sold two stands in a proposed township. In the meantime the purchaser paid an amount of money to the seller. Thereafter the seller amended the plan of the township in such a way that the two stands were omitted. The purchaser succeeded in his claim for restitution on the grounds of the seller's repudiation of the contract. The same will apply to the present case.
It should also be remembered that the usual remedies for breach of contract will be available to the injured party, namely specific performances or cancellation and damages in either case.

c) Discuss tacit terms, tacit implied terms from the facts, with reference to the description of tacit terms, the hypothetical bystander test and its application, trade usage and the distinction between tacit terms, express terms and terms implied by law. Refer to case law in your answer.

In order to create a contract the parties must make their wills clearly known.
However, once it has been established that a contract has come into being, a good deal of difficulty may arise in regard to the contents of the contract. It is not necessary for the parties to make known all the contents of the contract.
Our courts hold the view that something which the parties regard as obvious may form part of the contract, even if they have said nothing about it and even if they have made no other signs or gestures relating to it.

Our courts usually use the so-called hypothetical bystander test to determine whether a tacit term can be implied in a contract.
'a term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can be confidently said that if at the time the contract was being negotiated someone had said to the parties, what will happen in such a case, they would both have replied, of course, that would happen, obviously." Note that this test was expressly applied in the Van den Berg case but not directly in the Scholtz case.

Ito the Van den Berg case, A and B entered into an agreement for the sale of a farm and shares in a brick-producing factory on the farm.
At a later date the parties decided to cancel the agreement.
Thus the cancellation agreement was therefore the second agreement.
But A had already paid R10 000 which he sough to recover. The second agreement did not provide for the return of that which had already been delivered.

Thus the issue in this case was whether a tacit term providing for the return of that which had already been delivered formed part of the contract.
It was held that such term could be read into the contract.
Our courts are slow to read such term into a contract, and will only do so when satisfied that the term falls within the intention of the parties, as appears from the express provisions of the contract and the surrounding circumstances.
The court then referred to the hypothetical bystander test.
In this case, had the parties contemplated cancellation in these circumstances, they would have provided for return of money already paid. They are therefore deemed to have intended this term.

The facts of the Scholtz case were briefly as follows:
Buyer bought a bull from the seller for stud purposes.
However, it later became clear that the bull was infertile.
The buyer then cancelled the contract of sale and tendered return of the bull against return of the purchase price.
Such cancellation took place a year after the sale of the bull.
The buyer further alleged that he was entitled to cancel since the seller guaranteed him the fertility of the bull.

According to the seller, the buyer's right to cancel had already prescribed at the time he attempted to cancel.
The buyer's action was based on the aedilitian remedy of actio redhibitoria and that it had already prescribed.
The AD held that the buyer did not rely on the redhibitoria (but on the contract) and therefore his claim had not prescribed.
Furthermore, the seller had tacitly guaranteed that the bull he sold was fertile. The buyer therefore had brought the actio empti which had not prescribed.

34. Write notes on:
A supposition in a contract. (5)

In the case of a suspensive condition the operation of the obligation is rendered dependent on a future uncertain event. Parties may, however, arrange their relationships with reference to an uncertain event of the past

or an uncertain position in the present. This situation is referred to as a contract subject to a supposition.
In such a case there are no obligations subject to a condition: there are either no obligations whatsoever or there are wholly unconditional obligations, depending on the correctness of the supposition.

If it's possible, nothing is lacking as regards the contract, the performances are due immediately. If it is not possible, no obligations whatsoever are created by the contract: neither of the parties may sue the other on the contract. Any motive of the parties may be made into a term of their agreement, & the creation of their obligations may be rendered dependent on the truth of the supposition which the parties incorporated in their contract.
Note that it must always be a term of the agreement: it must be incorporated in & form a part of the contract between them, either expressly or tacitly. It is not enough that the parties may have had a particular motive in mind in entering into the contract: the motive must as it formed the basis of the contract.

35. Discuss "unfair contracts" with reference to case law. (10)

The unfairness or unreasonableness of a contract (or clause) towards one of the parties as well as the interest that the other party seeks to protect with the contract, are taken into account (Barkhuizen).
Notions of fairness, justice and equity, and reasonableness cannot be separated from public policy. Public policy is informed by the concept of ubuntu.
What is the role of principle of good faith plays in determining what is fair and reasonable in a contract. Good faith has been recognised as a fundamental principle that underlies the law of contract and informs its various rules and principles, including those regarding illegality.
Although good faith may have a subjective or objective meaning, commentators have suggested an objective test: has the one party so unreasonably and one-sidedly promoted his or her own interest at the expense of the other party that this infringement of the principle of good faith outweighs the public interest in the enforcement of the contract?
The unfairness and unreasonableness of a contract is in itself insufficient reason for declaring the contract contrary to public policy, as the courts do not have a general equitable jurisdiction to declare unfair or unreasonable or unconscionable contracts invalid.
In <u>Sasfin (Pty) Ltd v Beukes</u>, two contractual terms gave S (a financier) immediate and effective control of B's income as a doctor. B was furthermore not able to end this situation; only S could. The contract gave protection to S beyond what was reasonably necessary to protect its interest in having security for B's indebtedness. The Appellate Division found that the terms placed B in the position of a virtual slave working for the benefit of S. The court concluded:
An agreement having this effect is clearly unconscionable and incompatible with the public interest, and therefore contrary to public policy.

In Barkhuizen, a time limitation clause in a short-term insurance policy released the insurer from liability of the insured failed to server summons on the insurer within 90 days after the insurer repudiated a claim submitted under the insurance policy. Such a clause limits the right of the insured to seek legal redress. Court found that this right is not only a constitutional right, but also constitutes a public interest.
The legislator granted the courts and equitable jurisdiction in the Consumer Protection Act. Section 48(1)(a) prohibits a supplier from offering goods or services at an unreasonable price or on terms that are unfair, unjust and unreasonable.
Examples:

- **If the contract is so excessively one-sided in favour of the party other than the consumer;**
- **If the contract is so adverse to the consumer as to be inequitable;**
- **If a term is unfair, unreasonable or unconscionable;**
- **If the attention of the consumer has not been drawn to the fact, nature or effect of certain terms of the contract.**

A court may take the following factors into account to determine whether the contract is in whole or in part unconscionable, unjust, unreasonable or unfair:

- **Circumstances of the contract that existed or were reasonably foreseeable at the time the conduct occurred or the contract was concluded;**
- **The conduct of the parties respectively;**
- **Whether the consumer had to do anything that was not reasonably necessary for the legitimate interest of the supplier as a result of the conduct of the supplier;**
- **The fair value of goods or services;**
- **The amount for which and circumstances under which the consumer could get identical goods or services from a different supplier;**
- **Whether the goods were manufactured.**

Unfair enforcement of a contract
The unfair enforcement of a contract could be contrary to public policy. In Brisley v Drotsky, the Supreme Court of Appeal assumed, that the Sasfin principle could be extended to the enforcement of contractual terms. The parties had concluded an oral agreement contrary to a non-variation clause in a lease agreement. The lessee was late in payments of the rent in reliance on the oral agreement, but after accepting late payment for five months, the lessor cancelled the lease. The court found that the lessee's case fell far short of the requirement of exceptional unfairness.
Court held, that the enforcement of a clause would be invalid if the enforcement was so unfair or unreasonable in the circumstances that its enforcement was contrary to public policy.

36. Name 5 forms of breach of contract. (5)

(1) default by the debtor (mora debitoris) (negative malperformance)
(2) default by the creditor (mora creditoris) (negative malperformance)
(3) positive malperformance
(4) repudiation
(5) prevention of performance

37. S sells his house to P and the parties conclude a contract of sale that complies with formal requirements. Thereafter, S receives a higher offer for the house from Z, which he also accepts and the parties concludes a contract of sale that also complies with the formal requirements. Z is unaware of the contract between S and P and sells his own house and proceeds to contract a removal company to assist him with the move at a price of R20000. Z doesn't work for 3 days during the move. He earns a R1000 on average per day as an insurance broker. When Z arrives at the house of S to take occupation, he finds that it is already occupied by P, advise Z fully. (10)

This falls under the concept of damages. Thus Z can sue for damages.

1. **Breach of contract has occurred.**
2. **That innocent party has suffered damages**
3. **That there is a causal link between the breach & the damage**
4. **That the damages are general damages.**

In case of breach of contract 1 compares the present value of innocent party's estate with the value it would have had, had contract been carried out properly & on time. If present value is less than it would have been, damage has been suffered. Debtor must place creditor in same position he would have been if the contract was complied with. This formula for damages is referred to as Positive Interest.

Patrimonial loss is not only the diminution of a person's assets but also the amount by which it might have been enlarged. Patrimonial damage is referred to as the person's entire interest in the contract.
Damnum emergens: That is the amount actually lost the amount by which the person's assets have been diminished (actual damage).
Lucrum cessans: Loss of profit or prospective damage.

These 2 doesn't have much effect in assessing damages. What is to be assessed it the extent of the damage, namely whether the estate of the injured party is smaller now than it would have been if breach hasn't occurred.
Factual causality:
There must be a causal connection between the breach & damage. Conditio sine qua non test (But For Test) Factual Causation:
A certain result is caused by a certain act if that result would not normally have ensued but for such act.
Legal Causality:
May the innocent party hold the other party liable for all the consequences of breach – public policy & Policy considerations.

After causality has been established the Question arises whether the innocent party may hold the other party liable for all the consequences of the breach. For fairness for the guilty party, a line must be drawn between damages caused by his breach & for which he's liable, and damages which, although caused by breach, are so remote from it that he shouldn't be held liable for it.

General Damages:

Are those damages which flow naturally & generally from the specific kind of breach that has been committed, & the law presumes that the parties contemplated them as a probable result of the breach. Party that commits breach is held liable, without further ado, for general damages.

Difference between general & special damages was concluded in the *Holmdene Brickworks Case.*

Special Damages:

Are those damages which do not flow naturally & generally from the specific kind of breach. Party that commits breach will be liable for special damages in certain circumstances. To ascertain the circumstances, 2 principles can be applied, namely the contemplation principle & the convention principle.

Contemplation Principle:

In terms of this principle, the liability of the party who commits a breach of contract is limited to those damages which can fairly be said to have actually been contemplated by the parties, or my reasonably be supposed to have been contemplated by them as a probable consequence of a breach of contract. To establish what parties actually contemplated or may be supposed to have contemplated regard may be had to the subject matter & terms of the contract itself, or the special circumstances known to both parties at the time they contracted.

Convention Principle:

This principle limits the liability of the party who commits a breach of contract to those damages which the innocent party can prove as having been agreed on between them, explicitly or presumably. The parties must have contracted from the premise that such damages would be paid. Thus innocent party has to prove either an express or an implied provision concerning the damages. In terms of case law it appears that liability for special damages is ltd by means of the convention principle – Shatz Investment Case.

Authors are of the opinion that it should be limited by the contemplation principle.

Duty to limit, prevent or mitigate damage or loss:

Duty of injured party to prevent or mitigate the damages. But 1 should only do what is reasonable. Guilty party not liable for damages which injured party could have limited or mitigated by exercising reasonable care. Onus is on party in breach to prove that the injured party didn't act reasonably. Reasonable expenditure to mitigate damage or loss is recoverable.

38. Write notes on:
The exceptio non adempleti contractus. (10)

Exceptio non adimpleti contractus:

This is a defence which occurs in the case of reciprocal contracts, that is contract s in which the parties create obligations in terms of which the parties must either perform simultaneously or the 1 must perform before the other.

Where a party is sued for performance he (Defendant) may withhold performance until the claimant has tendered proper performance or has performed fully, provided that the claimant has to perform 1st or simultaneously by raising the defence of the exceptio. The right to withhold performance is referred to as the exceptio non adimpleti contractus. This is a form of Specific Performance.

This is only available as a defence when a reciprocal contract requires both parties to perform simultaneously or requires the Plaintiff to perform before the Defendant. If at the time of the action the Plaintiff's duty to perform is not yet enforceable the Defendant can't raise the exceptio.
Eg's:

1. **Cash sale**
2. **Credit sale**
3. **contract of lease**
4. **contract of mandate**
5. **contract of service**

When this defence can be raised:

1. **Where a Plaintiff has not performed at all: Defendant can raise this defence against the Plaintiff who has not performed at all is fair & reasonable.**

2. **Where the Plaintiff has performed defectively & the contract is upheld: To allow Defendant who has accepted & is using the Plaintiff's performance to raise the exceptio against the Plaintiff's claim for counter performance might operate extremely unfairly against the Plaintiff. The Defendant will have the benefit of the Plaintiff's performance while the Plaintiff will receive nothing in return.**

(2) Above creates a Problem & the Solution to the problem is found in <u>BK Tooling Case:</u>

Any contracting party has in principle a right to the Specific Performance undertaken by the other party in other words he has a right to enforce the contract strictly according to its terms. Right of party to a reciprocal contract to withhold his own performance until other party performs in full is a powerful weapon to enforce full performance. In principle, a Defendant who has accepted the Plaintiff's defective reciprocal performance is still entitled to raise the exceptio non adimpleti contractus against Plaintiff's claim. Where fairness so requires, a court may, at its discretion, refuse to allow a Defendant to raise the exceptio & order him to render a reduced counter performance.

Plaintiff in action based on reciprocal contract must where he upholds the contract have his pleadings in order & he must:

1. **Allege in his particulars of claim that he has rendered full performance from his side or he must tender full performance.**

If he's unable to prove that he has indeed performed in full & wishes the court to exercise its discretion in his favour by awarding him a reduced counter performance, he (Plaintiff) must allege & prove:

1. **That the Defendant is utilising (using) the defective performance.**
2. **That the circumstances exist which render it fair that the court should exercise its discretion in his favour.**
3. **By how much the counter performance must be reduced. (Market value of the thing).**

Where contract is cancelled: If the breach is sufficiently serious the innocent party may cancel the contract. Parties must restore what has been received & innocent party then has an action for damages.
Where a contract which has created an obligation to do something e.g., building a house, is cancelled by innocent party restoration of what has been received is impossible. Thus the innocent party derived some benefit from the other's incomplete or defective performance, but as contract has been cancelled the guilty party is now unable to claim a reduced counter performance, cancelled contract can't be enforced. The Plaintiff has a remedy for unjustified enrichment. He may recover in terms of his action the amount by which the Defendant was actually enriched at his expense or the amount by which he himself has been impoverished whichever is the smaller.

39. Discuss the principle of reciprocity. (5)

Principle of Reciprocity:
Contract's can be divided into unilateral & bilateral contract s. A contract is unilateral (contract of donation) when 1 party only assumes a duty to perform, whilst it is bilateral (contract of sale) when both parties assume such a duty.

Bilateral contract s is divided into reciprocal contract s (contract of sale & contract of lease) & contract s that are not reciprocal (contract of loan). Reciprocal contract's is essentially aimed at accomplishing an exchange of performance - contract of sale for e.g. is aimed at effecting the exchange of specific thing for specific sum of money - & the implications of this characteristic of reciprocal contract's is that there is no duty on 1 party to perform unless the other party counter performs. This means that 1 party to this contract has a right to either hold his performance until the other party performs unless of course he has agreed to perform 1st.
The defence to which this right to withhold performance gives rise is known as the exceptio non adimpleti contractus.

40. Write notes on:
The court's discretion to refuse an application for specific performance. (10)

Specific Performance:
Performance of that which the parties agreed to in the contract.

When Specific Performance will not be ordered:
Whenever Specific Performance is claimed by a party to the contract, court has a discretion to grant or refuse the order. This discretion of the court isn't confined to specific types of cases, nor is it circumscribed by any rule. Each case must be judged in the light of its own circumstances.

<u>Specific Performance will NOT be ordered in the following circumstances:</u>

1. **When Specific Performance has become impossible. ("Peters Case").**
2. **Where it is impossible for the court to control Specific Performance.**
3. **Undue hardship**
4. **Inability to fulfill obligations.**
5. **Where it concerns the freedom of the individual.**

41. X and Y are involved in a protracted negotiation to conclude an intricate software contract; X spends R8000 to do the required calculations. The parties are very close to agreement when Y suddenly breaks off negotiations. Can X institute action against Y? Discuss. (4)

Yes X can institute action against Y for damages.

Requirements for Damages:
1. **Breach of contract has occurred.**
2. **That innocent party has suffered damages**
3. **That there is a causal link between the breach & the damage**
4. **That the damages are general damages.**

General Damages:
Are those damages which flow naturally & generally from the specific kind of breach that has been committed, & the law presumes that the parties contemplated them as a probable result of the breach.

Party that commits breach is held liable, without further ado, for general damages.

42. Discuss the concept of "Reasonable Time" with regards to mora debitoris. (10)

This is when if the debtor neglects or fails to perform timeously in other words, when performance is due, where performance remains possible in spite of such failure he is guilty of breach of contract.

Reasonable time falls under Mora Ex Persona which 1 of the 2 forms of Mora Debitoris.

Mora ex persona:
This occurs where no date for performance has been fixed.
Where no date for performance has been fixed the debtor must perform within a reasonable period after the conclusion of the agreement. But if he fails to do so, he's not automatically in mora. When contract is silent about a time for performance, & debtor fails to perform within a reasonable time the creditor must fix a time by making a demand (interpellatio) on the debtor to perform at a specified time. When this time arrives & debtor fails to perform he falls in MORA EX PERSONA. Time fixed in the demand must, however, leave debtor a reasonable period for performance, reasonable, that is, taking into account the circumstances of which the parties were aware when the contract was concluded or which they could reasonably have foreseen at that time. If time in the demand isn't reasonable, the demand is ineffective & a fresh demand has to be made by the creditor.

What will constitute a reasonable period?
Nel v Cloete:
In casu it was decided that in determining a reasonable period for performance, only circumstances known to the parties at the time of contracting or reasonably foreseeable at the time can be taken into account.

FACTS:
Contract concluded for purchase of house. Nel paid Cloete full Purchase Price. Cloete delayed transfer because title deed was missing. He had to apply for a new 1. At time of contract neither of the parties knew of the situation. Nel gave Cloete a 2 month period to sort everything out. Court held that it was a reasonable period thus Nel could cancel contract.

43. Write notes on the 2 principles, which can be applied to determine whether a party who commits breach of contract will be liable to pay damages for special damages. (10)

<u>Special Damages:</u>
Are those damages which do not flow naturally & generally from the specific kind of breach.

Party that commits breach will be liable for special damages in certain circumstances. To ascertain the circumstances, 2 principles can be applied, namely the contemplation principle & the convention principle.

<u>1.</u> <u>Contemplation Principle:</u>
In terms of this principle, the liability of the party who commits a breach of contract is limited to those damages which can fairly be said to have

actually been contemplated by the parties, or my reasonably be supposed to have been contemplated by them as a probable consequence of a breach of contract.

To establish what parties actually contemplated or may be supposed to have contemplated regard may be had to the subject matter & terms of the contract itself, or the special circumstances known to both parties at the time they contracted.

2. Convention Principle:
This principle limits the liability of the party who commits a breach of contract to those damages which the innocent party can prove as having been agreed on between them, explicitly or presumably. The parties must have contracted from the premise that such damages would be paid.

Thus innocent party has to prove either an express or an implied provision concerning the damages. In terms of case law it appears that liability for special damages is limited by means of the convention principle – *Shatz Investment Case.*
Authors are of the opinion that it should be limited by the contemplation principle.

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44. Write notes on:
The difference between mora creditoris and prevention of performance. (5)

Mora Creditoris:
Creditor can also commit breach of contract by acting wrongfully. Where his co-operation is necessary for the fulfillment of the obligation of the debtor, the creditor is guilty of breach if he fails to co-operate timeously & performance remains possible.

Prevention of Performance:
This takes place where performance is made impossible by a contracting party after conclusion of the contract. It's a form of anticipatory breach of contract since it can take place either before, on or after the date set for performance.
Debtor = commits this where the object which must be performed is destroyed as a result of his fault.
Creditor = commits this where performance becomes impossible as a result of his delay.

Absolute / Objective prevention of performance:
Where performance is prevented permanently & as regards everyone.

45. John is the owner of a vacant stand and he concludes a contract with a builder, Peter. In terms of which Peter must build him a house on the stand according to a plan supplied by John. In terms of the contract, Peter must

complete the house by the 1st of July. Peter will be paid in full on the completion of the building. Peter completes the building on the 1st of July but it transpires that the house is 15 square meters smaller than the specifications required by the plan. Peter claims the full contract price from John. Advise fully. (15)

This breach of contract is a form of Positive Malperformance.

Positive Malperformance:
This is performance of something which doesn't comply with the terms of the contract or it is the doing of something which the contracting party undertook not to do.

2 Forms of Positive Malperformance:
1. **The debtor tenders faulty or defective performance.**
2. **Debtor does something he isn't permitted to do in terms of the agreement.**

Legal Remedies:
1. **Creditor may retain the defective performance & sue for damages to compensate for the loss caused by the defect.**
2. **He may reject the defective performance & claim proper performance.**
3. **He may reject the defective performance & claim damages from the other party as compensation.**
4. **He may resile from the contract if he has reserved to himself a right to resile OR if the breach of contract is so serious that he can't reasonably be expected to abide by the contract & be satisfied with damages.**

Here John has the remedy of the Exceptio Non Adimpleti contractus.

Exceptio non adimpleti contractus:
This is a defence which occurs in the case of reciprocal contracts, that is contracts in which the parties create obligations in terms of which the parties must either perform simultaneously or the 1 must perform before the other.

Where a party is sued for performance he (Defendant) may withhold performance until the claimant has tendered proper performance or has performed fully, provided that the claimant has to perform 1st or simultaneously by raising the defence of the exceptio. The right to withhold performance is referred to as the exceptio non adimpleti contractus. This is a form of Specific Performance.

This is only available as a defence when a reciprocal contract requires both parties to perform simultaneously or requires the Plaintiff to perform before the Defendant. If at the time of the action the Plaintiff's duty to perform is not yet enforceable the Defendant can't raise the exceptio.

What would the position be if John only discovered the defect in the house after he had paid Peter in full. Advise Peter. (5)

John would be entitled to damages.

Requirements for damages:
1. **Breach of contract has occurred.**
2. **That innocent party has suffered damages**
3. **That there is a causal link between the breach & the damage**
4. **That the damages are general damages.**

General Damages:
Are those damages which flow naturally & generally from the specific kind of breach that has been committed, & the law presumes that the parties contemplated them as a probable result of the breach.

Party that commits breach is held liable, without further ado, for general damages.

46. P buys a fridge from S for R500 on 18 October. P pays the purchase price immediately. They agree furthermore that P will fetch the fridge on 20 October at S's house. P fails to turn up at S's house on 20 October. S is very glad because he has found another buyer who is prepared to pay R1000 and he cancels the contract immediately. Was S entitled to cancel the contract and did S breach the contract by doing so? Discuss. (10)

Since P failed to turn up, he was late & fault lies with him, which constitutes mora debitoris.

Mora Debitoris:
If the debtor fails to perform timeously in other words, when performance is due, where performance remains possible in spite of such failure he is guilty of a breach of contract called Mora Debitoris. He is then in mora. MD relates to the time of performance alone & not to the nature of performance. For Mora Debitoris to arise the debt must be due & enforceable.

Mora Debitoris occurs:
When there is a delay in performance when the date of performance is fixed & that day has arrived.
2 Types:
1. **Mora Ex Re: This occurs when a day for performance is fixed by the contract & the debtor fails to perform on or before such day.**
2. **Mora Ex Persona: Occurs where no date for performance has been fixed.**

S is now entitled to damages from P, because P was in Mora.

Requirements for damages:
1. **Breach of contract has occurred.**

2. That innocent party has suffered damages
3. That there is a causal link between the breach & the damage
4. That the damages are general damages.

General Damages:
Are those damages which flow naturally & generally from the specific kind of breach that has been committed, & the law presumes that the parties contemplated them as a probable result of the breach.

Party that commits breach is held liable, without further ado, for general damages. S could cancel.

47. Write notes on:
a) The difference between general damages and special damages. (5)

General Damages:
Are those damages which flow naturally & generally from the specific kind of breach that has been committed, & the law presumes that the parties contemplated them as a probable result of the breach.

Party that commits breach is held liable, without further ado, for general damages. Difference between general & special damages was concluded in the Holmdene Brickworks Case.

Special Damages:
Are those damages which do not flow naturally & generally from the specific kind of breach.

Party that commits breach will be liable for special damages in certain circumstances. To ascertain the circumstances, 2 principles can be applied, namely the contemplation principle & the convention principle.

b) Restitution by the party claiming rescission of a contract due to the other party's breach of contract. (5)

Rescission of a contract:
This is a juristic act as a result of which the consequences of a valid © are terminated. Where an obligation is not fulfilled the obligation is extinguished when the contract is cancelled.

Impossibility of restitution:
If Party who can resile makes restitution of what he has received impossible he forfeited his right to rescission. But he may resile if he is not to blame for inability to restore, provided that returns the surrogate, if any, of what was to have been restored. Party who wishes to resile may do so in certain circumstances where the return of the performance which he received has become impossible through no fault on his part. This principal also applies

if the innocent party resiles because of the other party's breach & can't thereafter make restitution of what he has received under the contract.

c) Special damages for breach of contract. (5)

Special Damages:
Are those damages which do not flow naturally & generally from the specific kind of breach.

Party that commits breach will be liable for special damages in certain circumstances. To ascertain the circumstances, 2 principles can be applied, namely the contemplation principle & the convention principle.

1. Contemplation Principle:
In terms of this principle, the liability of the party who commits a breach of contract is limited to those damages which can fairly be said to have actually been contemplated by the parties, or my reasonably be supposed to have been contemplated by them as a probable consequence of a breach of contract.

To establish what parties actually contemplated or may be supposed to have contemplated regard may be had to the subject matter & terms of the contract itself, or the special circumstances known to both parties at the time they contracted.

2. Convention Principle:
This principle limits the liability of the party who commits a breach of contract to those damages which the innocent party can prove as having been agreed on between them, explicitly or presumably. The parties must have contracted from the premise that such damages would be paid.

Thus innocent party has to prove either an express or an implied provision concerning the damages. In terms of case law it appears that liability for special damages is limited by means of the convention principle – Shatz Investment Case. Authors are of the opinion that it should be limited by the contemplation principle.

48. B builds a swimming pool for O. Parties agree that the pool must be completed on 27 July 2006. Contract price is R20000 and O pays R5000 upon signing the agreement. On 27 July B and O inspected the pool, but O isn't satisfied. Paving around the pool is covered in cement splotches and pool requires another layer of paint. O is of the opinion that B has committed breach of contract. He refuses to pay B a cent further and forbids B to set foot on the premises again.

(a) Did B commit breach of contract? Substantiate answer. (4)

Yes, positive malperformance has been committed. This is performance of something which doesn't comply with the terms of the contract or it is the doing of something which the contracting party undertook not to do.

There are two forms of Positive Malperformance:
1. **The debtor tenders faulty or defective performance. (This 1 applies here)**
2. **Debtor does something he isn't permitted to do in terms of the agreement.**

(b) Can O cancel the agreement? Substantiate answer. (2)

Yes.
1. **Creditor may retain the defective performance & sue for damages to compensate for the loss caused by the defect.**
2. **He may reject the defective performance & claim proper performance.**
3. **He may reject the defective performance & claim damages from the other party as compensation.**
4. **He may resile from the contract if he has reserved to himself a right to resile OR if the breach of contract is so serious that he can't reasonably be expected to abide by the contract & be satisfied with damages.**

(c) Did O commit breach of contract if you assume that O may not validly cancel the agreement? Substantiate your answer. (2)

What remedy/s does O have at his disposal Where B institutes action for the balance of the purchase price and the agreement isn't cancelled? Substantiate answer. (6)

O has the remedy of damages to his disposal.

Requirements for damages:
1. **Breach of contract has occurred.**
2. **That innocent party has suffered damages**
3. **That there is a causal link between the breach & the damage**
4. **That the damages are general damages.**

General Damages:
Are those damages which flow naturally & generally from the specific kind of breach that has been committed, & the law presumes that the parties contemplated them as a probable result of the breach.

Party that commits breach is held liable, without further ado, for general damages.

49. Discuss the concepts mora ex re and mora ex persona.

This occurs if a day for performance is fixed by the contract and the debtor fails to perform on or before such day. He is then automatically in mora (in default), because dies interpellat pro homine (the day makes demand

instead of the man). The debtor is only in mora ex re if it was the intention of the parties that he should perform on or before the specified day. The intention of the parties may be expressed in an express or tacit contractual term. In addition the day must be a dies certus an ac quando, that is to say, a specific day which is bound to arrive at a certain time. In fact, the debtor must be able to establish beforehand precisely when he is expected to perform. An example would be where the contract stipulates that performance will take place on the 1st of June and the debtor fails to perform on or before the said date.

The debtor can be in mora only as regards a due debt. Thus where the obligation is subject to a suspensive time clause or a suspensive condition there can be no question of mora before the time agreed on arrives or the condition is fulfilled. Nor can the debtor be liable on the ground of mora where the obligation is merely a natural obligation, such as a wagering debt or a debt which has become prescribed, or where the debtor has a valid defence against the creditor's claim, such as the exceptio non adimpleti contractus, in the case of a reciprocal agreement where performance of the parties must be simultaneous, the creditor must, in his demand, tender performance, otherwise his claim can always be defeated with the exceptio non adimpleti contractus.

The delay must be due to the fault of the debtor. It must be imputable to him, for example, because he himself was responsible for the delay or did not take the necessary precautions against the delay. The debtor will not be liable for breach if the delay was caused by force over which he had no control or by the acts of people for whose conduct he cannot be held responsible. Such circumstances provide the debtor with an excuse for his delay in performance. Where the delay is permanent and not due to the fault of the debtor, we are dealing with supervening impossibility of performance, which, from the debtor's point of view, serves both to release and to excuse him - it releases him in that it terminates the obligation and excuses him in that the debtor cannot be in mora. Where the delay is merely temporary and is not due to the fault of the debtor, it does not automatically release him, but merely excuses him - there is an excusatio a morae. Where the delay is in fact the debtor's fault, he is guilty of breach of contract, whether in the form of mora debitoris or prevention of performance.

Mora ex persona occurs where no day for performance has been fixed. Where no day has been fixed for performance, the debtor must perform within a reasonable period after the conclusion of the agreement. However, if he fails to do so, he is not automatically in mora. When a contract is silent about a time for performance, and a debtor fails to perform within a reasonable period the creditor must fix a time by making a demand (interpellatio) on the debtor to perform at a specified time. When this time arrives and the debtor fails to perform he falls in mora ex persona. The time fixed in the demand must, however, leave the debtor a reasonable period for performance; reasonable, that is, taking into account the circumstances of which the parties were aware when the contract was concluded or which they could reasonably have foreseen at that time. If the time in the demand is not reasonable, the

demand is ineffective and a fresh demand has to be made by the creditor. A court will not amend the original period to what it considers reasonable. A demand (interpellatio) is a notice from the creditor that he requires performance within a stipulated period, which must be a reasonable period. (Nel v Cloete) In this case it was decided that in determining a reasonable period for performance, only circumstances known to the parties at the time of contracting or reasonably foreseeable at that time can be taken into consideration. Although there are indications in our law that an oral demand is permissible, our practice requires a letter of . The demand may be made judicially (intra iudicialis) by means of a summons, or in writing, which does not constitute a summons, extra iudicialis. Because the demand fixes a reasonable time within which performance must take place, the debtor is in mora only if, after the lapse of the time fixed in the demand, he has not yet performed.
In Barron, however, the view was held that where "time is of the essence", this means that it is obvious that performance must take place on a certain date without that date being mentioned, and that if a reasonable time has elapsed, no demand is necessary for the acquisition of a right of rescission.

50. Write notes on:
The reduction of a penalty amount in a contract (5)

The penalty is not necessarily enforceable to its full extent, since Sec 3 give the court the power to reduce the penalty amount to what it deems "equitable".

The person who bears the onus of proving the excessiveness or otherwise of the penalty stipulation:
The onus is on the debtor to prove that the penalty is out of proportion to the prejudice suffered by the creditor & that it should consequently be reduced. Once the debtor has made out a prima facie case that the penalty is excessive, there is an onus on the creditor to lead evidence in rebuttal of the debtor's prima facie case.

Reduction comes into Question only when it is apparent to the court that the penalty is out of proportion to the prejudiced suffered by the innocent party.

Application of the exceptio doli (5)

Definition:
The exceptio doli is a defence introduced in about 200 BC which could be raised by a Defendant if the Plaintiff had acted contrary to the requirements of good faith at the moment the contract was entered into, or at the moment of enforcing the action. This made the exceptio doli the means of

ensuring that an equitable decision was reached. The exceptio doli brought the requirements of good faith into the law of contract.

Application:
In the Bank of Lisbon Case the Question arose whether the exceptio doli could be raised as a defence in order to obtain an equitable decision. The Appellant Division came to the conclusion that the exceptio doli didn't

Security cession (4)

Cession is the transfer of a personal right by means of an agreement.

Cession may also be used as a form of security.
E.g.: A owes B a R100. B in his turn owes C R80. As security for the latter debt B cedes to C his claim against A with this proviso that C should re-cede to him, B, the claim against A as soon as he pays back the R80. Should B fail to settle his debt to C, C is entitled to enforce the ceded claim against A. The transaction between B & C is known as an out-and-out security cession in securitatum debiti. A security cession can also be in the form of a pledge. The dominium of the right is restrained by the pledgor (cedent) while only the quasi-possession is transferred to the pledgee (cessionary). The pledgee can realise (sell) the right to enforce it against the debtor when the pledgor fails to pay the debt he owes the pledgee.

Novation (Novatio):
This is an agreement between a creditor & a debtor, to an existing obligation whereby the old debt between them is extinguished & a new obligation is created in the place of the old one.

E.g.: A has to deliver a horse to B. Parties reach a new agreement that A will deliver a cow instead of a horse to B. Original agreement is extinguished by the new agreement.

Write notes on: Set-off (5)

Set-Off (Compensatio):
This is the extinction of debts owed reciprocally by 2 parties.

EG: A owes B R100 & B owes A R80. The R80 can be set of against the R100 which means A owes B R20 after set-off.

There are 4 requirements for set-off:
1. **The debt must be similar in nature: 2 monetary debts may set each other off, 2 debts for delivery of the same kinds of goods may set each other off.**

2. **Liquidated debts: A liquidated debt is an amount which is fixed or can readily be fixed.**

3. **The debts must be due: A debt which is already due can't be extinguished by one which is not yet due.**

4. **Debts between the same persons & persons in the same capacity: Debts must be reciprocal, that is, they must exist between the same parties in the same capacities. E.g.: set-off a debt owed to each other in their personal capacities.**

51. Discuss "Peters, Flamman & Co v Kokstad Municipality" with regards to supervening impossibility of performance (5)

Supervening Impossibility of Performance:
If performance becomes impossible after conclusion of the contract, the obligation is terminated. The object of the claim (personal right), that is the performance, has been extinguished & with that the claim is terminated.

The General Principle that a debtor is released & excused where performance becomes impossible through no fault of his own is often stated differently, namely that the debtor is released where performance is prevented by vis maior or casus fortuitus.

Vis maior:
This means "some force, power or agency which can't be resisted or controlled by the ordinary individual. This term is now used as including not only acts of nature, vis divina or acts of God, but also the act of man.

Casus fortuitus:
This is "a species of vis maior & imports something exceptional, extraordinary or unforeseen, & which human foresight can't be expected to anticipate, or if it can be foreseen, it can't be avoided by the exercise of reasonable care or caution". E.g.: Legislation.

Peters, Flamman & CO Case:
Facts:
Before World War 1 P & CO contracted with K municipalities to light their streets for a period of 20yrs. 1915 WW1 broke out & it became impossible for P & CO to perform their obligations. 1917 their partnership was wound up. K Municipalities sued for damages for breach of contract.

Held:
As soon as it has became impossible for P & CO to perform in terms of the ©, they were discharged from liability.

The Judge said it became impossible for them to perform by virtue of an Act of State (casus fortuitus) & thus their obligations under the contract were terminated.

52. Distinguish between delegation & cession (4)

Delegation:
Here both rights & duties are transferred by agreement.
(Now the parties change).

E.g.: A and B enter into a contract, A approaches B and asks whether C may take his place, if B agrees, C takes over all A's rights and obligations against B. Consent of all the parties is necessary. When C takes A's place, the obligations between A and B is terminated.

Cession:
Every estate consists of rights & obligations, & to a large extent a person's economic activities involve the transfer of his rights to others. A claim (a personal right) is just as much an asset in one's estate as for e.g. a right of ownership to a car. For this reason there is a need for the passing of such assets to other persons, for instance, on the holder's death, insolvency, etc. In such cases the claim goes over to the heir, trustee, etc by operation of law. But it may be of interest to the holder to transfer his claim to somebody else by means of a juristic act. The juristic act can effect such a transfer of a personal right (or claim) is known as a cession. Cession is the transfer of a personal right by means of an agreement.

53. E & O agree that E will work at 1 of O's hotdog stalls at the FNB stadium during the variation games of the soccer world cup at remuneration of R2000 per day. Since E who has been unemployed for 6 months is desperate for money, O guarantees that E will be given this job. But structural defects are discovered in the stands at the FNB stadium & as a result all the games scheduled to be played there are cancelled. Advise E. (6)

A valid contract came into being between O & E but due to a vis maior the obligations of both parties to the agreement was terminated. No one can sue for breach of contract.

Supervening Impossibility of Performance:
If performance becomes impossible after conclusion of the contract, the obligation is terminated. The object of the claim (personal right), that is the performance, has been extinguished & with that the claim is terminated.

Vis maior:
This means "some force, power or agency which can't be resisted or controlled by the ordinary individual. This term is now used as including not only acts of nature, vis divina or acts of God, but also the act of man.

Casus fortuitus:

This is "a species of vis maior & imports something exceptional, extraordinary or unforeseen, & which human foresight can't be expected to anticipate, or if it can be foreseen, it can't be avoided by the exercise of reasonable care or caution". E.g.: Legislation.

54. James sells a new navigation system to Patrick for R300000 and undertakes to install it on Patrick's trawler. James warrants that the system complies with a number of specifications. Month after James has installed system and Patrick has paid James the R300000 the trawler is lost at sea during a storm. 3 years later, Patrick finds out that the system didn't comply with most of the specifications. Patrick cancels the contract in writing. Letter of rescission is delivered to James who never reads the letter because the letter is lost amongst the correspondence on his untidy desk. James refuses to pay Patrick back the R300000.

The questions for this scenario may vary, but in essence this is breach – positive malperformance. Discuss. Then remedies for breach and more specifically cancellation (Swart) and damages (NB).

55. Discuss the current role of the underlying principles in the South African law of contract

The principle of autonomy has influenced our law and THE principle of our law of contract today. Our courts have denied that they have a general equitable jurisdiction to refuse the enforcement of unfair contractual terms, which are clear and not against public policy (the Bank of Lisbon case).
The courts insist that public policy requires that contracts validly concluded should be strictly enforced. The principle of good faith currently plays a lesser role in South African law than the principle of autonomy. The current legal position after the Bank of Lisbon case is that good faith forms the foundation of the substantive contractual rules and that its supplementary operational function is to fill gaps in our law, to clarify any uncertainty and to extend and adapt existing rules of contract law
Both the conclusion of the contract and the execution of the contract are relevant here. Misrepresentation, undue influence and duress form a closed category of instances where consensus has been obtained in an improper manner, and the courts will probably not extend it to include new.
Our law does not require that the parties have to perform in good faith The courts use a number of concealed methods to give effect to the principle of good faith with regard to the consequences of contracts: the interpretation of contracts, terms implied by law and tacit terms.
The courts use the rules of interpretation of contracts in particular to ensure that a contract operates fairly and reasonably as far as both parties to a contract are concerned. These concealed methods are unreliable, because the principle of autonomy forms the limits within which they can be applied. The parties can always validly conclude a contract with express

terms, which are clear and unfair to one of the parties as long as these terms are not against public policy. The mere fact that the terms are unfair does not mean that they are also contrary to public policy.

56. X hands in her shocking pink sued jacket at the dry cleaner. Y hands her a receipt. On the back of the receipt is a clause excluding Y's liability in the event of negligent damage to or theft of any goods handed in for dry cleaning. The same words appear on a big notice board in the shop which is clearly visible. When X fetches her jacket, she is dismayed to discover that the jacket's colour has been changed by the dry cleaning process. Is she bound by the exemption clause? Discuss briefly. (5)

With so called ticket contracts one of the parties' issues a ticket on which certain contractual terms appear. The question is whether the other party may be held bound to such terms where that party has not signed the ticket in question. Following the English decisions out courts use a three-legged test.

- **Did the relevant person know that there was writing on the ticket?**
- **Did he know that the writing referred to terms of the contract?**

If both questions can be answered in the affirmative, the terms form part of the contract. If either question was answered in the negative another question follows: did the party who issued the ticket take reasonable steps to bring the reference to the terms to the attention of the other party? In the present case X will probably be held bound because of the notice board which also refers to the contractual terms.

57. "Illegal contracts in terms of Statute" - does the statute intend to nullify the contract OR merely fine the wrongdoer?

A contract is void where the relevant statutory enactment expressly so provides, example, sale of dangerous weapons.
The particular statute has to be interpreted and the courts take the cumulative effect of the following factors into consideration in determining whether the legislator impliedly intended the contract to be void:

- **What is the object of the statute and what mischief (harm) is the statute directed against? If the validity of the contract brings about the harm the statute is directed against, it is an indication that the legislator intended the contract to be void.**
- **Does the enactment impose a criminal sanction? This is usually an indication that the legislator intended the contract to be void. However, this is not the case where the sanction provides adequate protection against the mischief that the statute is directed against.**
- **Does the enactment merely server to protect the revenue of the state? If the answer is in the affirmative, it is an indication that the legislator intended the contract to be valid.**

- **Does the provision merely protect individuals or does it involve a public interest that requires protection by voiding the contract? If the provision is for the protection of the public, it would be an indication that the legislator intended the contract to be void.**
- **What are the consequences of a particular interpretation of the contract? A balance-of-convenience test is employed that questions whether nullity of the contract would cause greater inconvenience and injustice than allowing the legal conduct to stand.**

58. On 1 April, X buys a house from Y for R500 000. It is a term of the contract that transfer will be given within a reasonable time after the buyer has lodged bank guarantees to secure payment of the purchase price. X lodges the required guarantees on 1 May, but on 1 August transfer has not yet been given. On this date X advises Y that he is resiling form the contract with immediate effect, and is claiming R25 000 damages. Discuss with reference to case law. You may assume that the contract of sale complies with all the formal requirements

This question is concerned with mora debitoris and repudiation as forms of breach of contract.
X could rescind the contract on 1 August only if Y were in breach at that date, and the only type of breach of which Y could have been guilty was mora debitoris. The first point to be determined therefore, is whether Y was in mora on 1 August. (NB: Mora debitoris is involved, not mora creditoris. Two obligations arose from the contract of sale, namely the obligation in terms of which X has a duty to pay the purchase price (with Y having the corresponding right to receive payment) and the obligation in terms of which Y has the duty to give transfer of the house (with X having the corresponding right to receive transfer). In the first of these obligations, X is debtor and Y creditor and, in the second, Y is debtor and X creditor. Therefore, if Y fails to give timeous transfer he is failing in his duty as debtor and not as creditor. X could, of course, be in mora debitoris if he should fail to lend his timeous cooperation to the extent that it might be necessary to enable Y to effect transfer.)
The question: whether Y was in mora debitoris on 1 August: the contract did not fix a date for performance by Y, with the result that Y could not have been in mora ex re. The clause requiring Y to give transfer within a reasonable time after the bank guarantees had been lodged does not fix a time for performance with the degree of certainty which is necessary for mora to arise ex re). X had not sent a demand (interpellatio), which means that Y could not have been in mora ex persona either. Moreover, it cannot be argued that Y was in mora on the authority of Federal Tobacco Works v Barron, and the decisions in which that case was followed. Apart from the fact that some doubt has been cast on the authority of this line of decisions, they are in any case not in point, as there is nothing in the facts

of our problem to indicate that time was of the essence to the contract. One must consequently conclude that Y was not in mora on 1 August and that X, for that reason, was not entitled to cancel the contract on that date. Even if Y had been in mora, X would still not have been entitled to cancel, as the contract did not embody a lex commissoria and X had not given Y a notice of recission.
The effect of X's attempted cancellation of the contract at a time when he had no right to cancel - X's cancellation probably amounted to a repudiation of the contract, in that it unequivocally informed Y that X no longer intended carrying out his part of the contract. It is not necessary for repudiation that the person who repudiates should have the subjective intention to repudiate. It is sufficient if his conduct, objectively assessed, informs the other party beyond reasonable doubt that the contract will not be carried out. Mala fides is no requirement. Even if X, therefore, honestly believed that he was entitled to cancel the contract, he could still be held guilty of repudiation once it emerged that he had no right to cancel, provided only that his intention not to continue the contract was clear. Y would then have the usual remedies on the ground of X's repudiation (1). He could, for instance, cancel the contract (by accepting the repudiation) and claim damages, or he could uphold the contract.

59. Critically discuss one of the following cases with regard to damages caused by a breach of contract:
    1. Whitfield v. Phillips 1957 (3) SA 318 (A)
    2. Shatz Investments Pty) Ltd v. Kalovyrnas 1976 (2) SA 545 (A)
    3. Lavery & Co. v. Jungheinrich 1931 AD 156. (10)

Damages are awarded after a breach of contract. Because of the contract the creditor had certain expectations which he can claim to have fulfilled. The aim of the awarding of damages must therefore be, to put the creditor in the financial position inwhich he would have been had the contract been properly performed. Although damage can be suffered in different ways there is only one formula for calculating the damages to which the creditor is entitled. This entails calculating the financial position in which he would have been if the contract had been properly performed and then subtracting his present financial position from that. The creditor can only claim loss caused by the breach. The plaintiff must establish this causal link between the loss and the breach of contract. A difficult question which requires attention is whether the party committing a breach of contract must be held liable for all consequences flowing from his breach. Our courts distinguish between general and special damages. General damages are those which flow naturally and generally from a specific kind of breach. The party that commits a breach of contract is held liable for general damages as a matter of course. Special damages, on the other hand, do not flow naturally and generally from a specific kind of breach. Liability for special damages is limited by the implementation of either of two principles viz. the contemplation and convention principles.

According to the contemplation principle, liability is limited to those damages which were actually contemplated by the parties or may reasonably be supposed to have been contemplated by the parties as a probable consequence of a breach of contract.
The convention principle limits liability to those damages which the innocent party can prove as having been contracted for. The innocent party must prove either an express or an implied provision in regard to the payment of damages. See the comment on the different cases for a more comprehensive explanation of the two principles.
The purpose of discussing the different cases with regard to special damages is to ascertain which principle was applied to limit liability and how it was applied.

Lavery & Co Ltd v Jungheinrich 1931 AD 156
The plaintiff L & Co. claimed damages from the defendant based on the defendant's breach of contract. The defendant, a manufacturer of steel scaling-shafts supplied the plaintiff with defective shafts. The plaintiff resold these defective scaling-shafts and consequently his business reputation suffered severely. The plaintiff lost its market for scaling-shafts because many customers who had previously placed orders now refused to have business dealings with the plaintiff.
Therefore, the question is whether the loss of trade or injury to business reputation (clearly special damages) "can be said to have been in the actual contemplation of the parties or may-reasonably be supposed to have been in their contemplation as a probable consequence of a breach of the contract." (Curlewis JA)
From this statement by the judge it appears that the contemplation principle is being applied in an attempt to decide whether the defendant is liable for the damages claimed.
On the other hand, Curlewis JA: "But in most cases such special damage would entirely depend on special circumstances which would have to be proved before a court could possibly say that such damage can reasonably be supposed to have been within the contemplation of the parties as the probable consequence of a breach of the contract..."
From this statament it appears that the judge favours the convention principle even though he still refers to the "contemplation" of the parties. However, Curlewis JA goes further and actually indicates what must be alleged by the plaintiff in order to prove that the special damage was supposedly within the contemplation of the parties as the probable consequence of a breach of their contract. He says that:
"It seems to me that to justify that claim for damages the declaration must at least allege knowledge on the part of the defendant at the time of making the contract that, if he supplied plaintiff with defective scaling-shafts in breach of his warranty and if plaintiff resold those shafts, plaintiff's business reputation would probably be injured and plaintiff would probably suffer a loss of trade or profitable business, and that the contract was entered into by the parties on the basis of such knowledge."

The plaintiff's declaration did not contain any of these allegations and based on this reasoning the appeal court confirmed the decision of the court a quo which had upheld the exception to the claim for damages.
Wessels JA concurred with Curlewis JA in repect to what the decision should be, but it is nevertheless necessary to draw your attention to certain statements made in the course of his judgement.
Wessels JA held that the contract must be entered into: "with the knowledge and in view of these special circumstances". However, he qualifies this statement by stating that:
"It must be so far in the mind and contemplation of the parties as virtually to be a term of the contract."
"The defendant could only be held liable if he in such a case had contracted that he would pay damage for loss of business or business reputation in case the shafts were defective. There is no such allegation in the declaration, and the exception therefore, was rightly upheld."
There appears to be support for both the contemplation and convention principles in both the judgements. However, it has also been suggested that the weight lies on the side of the convention principle.
On the other hand, nearly all the subsequent cases in our courts that refer to, or apply Lavery's case including Whitfield mention only the contemplation principle as expounded by Curlewis JA.

Whitfield v. Phillips 1957 (3) SA 318 (A)
In August 1953 W sold his farm to P and X, the plaintiffs, for £40 000. P and X informed W that they required the farm for planting and cultivating pineapples on a large scale. P and X bought one million Cayenne pineapple plants and commenced preparing the land for planting after the sale had been concluded. However, W repudiated the sale in October 1953. P and X sued for damages claiming: (a) the loss of one year's crop from the Cayenne plants and (b) the loss of crops from Queen pineapple plants that were already established on the farm at the date of the sale. The court a quo awarded P and X £12 333 on claim (a) and £2 000 on claim (b). W instituted an appeal against this award and P and X cross appealed.
The majority held that the loss which P and X had suffered in regard to the crop from the Cayenne plants must have been in the contemplation of both parties as a consequence of a repudiation by W; that the award in respect of claim (a) should stand but that as P and X had not proved that the value of the Queen pineapple crop did not form part of the consideration for the purchase price, claim (b) had to fail.
In regard to the question of damages attention is only given to the limitation thereof. Steyn JA at 329 states that :
"... I shall accept that the loss of the profits which the plaintiffs say they suffered in respect of the first crop of Cayenne pineapples which they would have produced on Thorn Park (the farm) had the defendant not repudiated the sale, would not constitute intrinsic damages, but special or extrinsic damages;" and would
"... according to the principles applied by this court, be recoverable if it be shown that it may, in the circumstances attending this sale, reasonably be

supposed to have been in the contemplation of the parties as likely to result from its repudiation,"
Hoexter JA in his dissenting judgment at 325 states that: "The question is not whether the parties contemplated that the plaintiffs would not be able to buy another farm in time to plant Cayennes during the 1953-4 planting season, but whether they contemplated that no other buyer would be able to plant a million Cayenne plants ..."
From these excerpts it should be obvious that the entire court assumed that a claim for special damages will succeed if the damages were in the contemplation of the parties at the time of entering into the contract. None of the qualifications or requirements raised in the Lavery case were repeated in Whitfield.

Shatz Investments (Pty) Ltd v. Kalovyrnas 1976 (2) 545 (A)
Here K hired premises from S for the purpose of conducting a restaurant and fast-food business. In terms of the contract S was prohibited from letting any other premises in the building for a similar purpose. K spent R14 000 on equipping the premises. Before K had even opened his business, S let premises to another person in breach of the contractual undertaking. When this business actually opened, K's business was immediately adversely affected. A third party had offered to buy the business as a going concern for R25 000 before the competing business opened but this offer had not been accepted. K cancelled the contract and after protracted negotiations sold the fixtures to S for R10 000. He claimed R30 000 from S for the loss he suffered by not being able to sell the business as a going concern - R10 000 for the fixtures and fittings and R20 000 for loss of goodwill. (1 mark) The trial court awarded R2 500. S appealed and K cross appealed as to quantum. K's cross appeal succeeded. The court's decision was unanimous. The court held that K's claim amounted to a claim for the loss of goodwill and that as such it was a claim for special damages. (A claim for the net loss of the rental value of the leased property for the unexpired term of the lease would be a claim for natural damages which a lessee suffers as the result of the lessor's breach of contract.) The court held that the convention principle as stated by Lavery's case was criticisable in certain respects, but that it could not be reconsidered in the absence of full argument. The convention principle was therefore to be applied. The court then applied the principles of Lavery's case to the facts of the present case. The court inferred from the facts known to both parties at the time of contracting and the terms of the contract that the parties must have contemplated that the lessee would want to sell the business as a going concern and so capitalise on the goodwill. The court then concluded that it could be inferred from the terms of the contract itself and the other special commonly known circumstances at the time of conclusion of the contract that the lease was entered into "on the basis of" or "with a view" to such common knowledge. It could therefore be reasonably supposed that the parties contemplated when they contracted that if the lessee was precluded from disposing of the business through the lessor's breach of contract he would probably lose the advantage of capitalising on his goodwill and also that the lessor by contracting on those terms virtually or tacitly assumed liability for such

damages. It is clear that the court professes to apply the convention principle but in actual fact applies the tests of the contemplation principle. The convention principle:

1. **A party is held liable for damages on the convention principle because the parties tacitly agreed to be liable for damages in the case of breach of contract by one of them. The convention principle is based on a fiction for two reasons. The first reason is that the courts usually apply the hypothetical bystander test in order to determine if there is a tacit term in a contract, but neither this test not any other test for tacit terms is applied in any of the cases on remoteness of damages. The second reason is that the parties to a contract do not usually contemplate the possibility of a breach of contract at the time of conclusion of the contract but contemplate performance. The breach of contract is the real reason for liability.**
2. **Many writers are therefore in favour of the contemplation theory There are, however, those who still favour the conclusion of the contract as the determining time**
3. **The contemplation principle should be applied at the time of the breach of contract**

Discuss the impact of the Consumer Protection Act 68 of 2008 upon the law of contract with reference to its aims, objectives, scope, national regulatory institutions, and sanctions. [15]

The CPA is bound to have a huge impact on the conduct of businesses in South Africa, and the law of contract.

The primary purpose of the Act is to protect consumers from exploitation in the marketplace, and to promote their social and economic welfare. More specifically, it aims to:

- Establish a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, and responsible, for the benefit of consumers generally;
- Promote fair business practices;
- Protect consumers from unconscionable, unjust, or unreasonable business practices.

The scope of the Act is very wide. It applies to:

- Most transactions concluded in the ordinary course of business between

suppliers and consumers within South Africa, as well as;

- The promotion of goods and services that could lead to such transactions, and;
- The goods and services themselves once the transaction has been concluded.

A supplier is any person (including a juristic person, trust, and organ of State) who markets any goods or services.

A consumer includes not only the end-consumer of goods and services but also:

- Franchisees
- Relatively small businesses in the supply chain (asset value or annual turnover below the threshold determined by the Minister)

The Act does not apply to any transaction in terms of which goods and services are promoted or supplied:

- To the State

- To a juristic person with an asset value or annual turnover above the threshold
- Employment contracts
- Credit agreements
- Transactions exempted by the Minister

These rights are protected and enforced not only through the courts, but the National Consumer Commission and the National Consumer Tribunal. Failure to comply with provisions of the Act might attract various sanctions, commencing with compliance notices and leading possibly to the imposition of fines and criminal penalties. Contractual provisions in contravention of the Act may be declared null and void to the extent of non-compliance.

List and very briefly discuss the requirements for a valid offer and acceptance. [10]

OFFER:

- Must be firm.

(That is to say, with the intention that its acceptance will call into being a binding contract.)

- Must be complete.

(It must contain all the material terms of the proposed agreement.)

- Must be clear and certain.

(It should be enough for the addressee to answer merely "yes" for a contract to come into being.)

- Must meet the requirements of the Consumer Protection Act.

ACCEPTANCE:

- Must be unqualified.

(It must be a complete and unequivocal assent to every element of the offer.)

- Must be by the person to whom the offer was made – *Bird v Summerville*.

(E.g. the offer to sell farm A cannot be accepted by A and B jointly.)

- Must be a conscious response to the offer – *Bloom v American Swiss Watch Co*.

(A person cannot accept an offer if he was not aware of it.)

- Must be in the form prescribed by the offeror, if any.

State the ways an offer may be terminated.

1. Rejection of the offer
2. Acceptance of the offer
3. Effluxion of the prescribed time, or of a reasonable time
4. Death of either party
5. Revocation of the offer
6. Loss of legal capacity to act

Discuss and distinguish between an option and a right of pre- emption. [10]

An option is a substantive offer, reinforced by an agreement in terms of which the offeror undertakes to keep his offer open to the offeree for a specified period.

A right of pre-emption is a type of right of preference. It is given by a prospective seller to a prospective purchaser, to give the purchaser preference if the prospective seller should decide to sell.

There are significant differences between the two:
In the case of an option to buy, the grantor has already made a firm offer to the grantee, and the power to conclude the sale lies exclusively in the hands of the grantee.
With a pre-emption agreement, however, there is as yet no firm offer "on the table" – merely an undertaking to make an offer to the grantee if the trigger event occurs (usually, if the grantee decides to sell the property). The grantor accordingly retains the power to decide whether or not to sell, and cannot be compelled to do so unless or until the trigger event has occurred.

State the requirements for duress and undue influence.

DURESS (improper pressure that amounts to intimidation):

1. Actual violence or reasonable fear
2. The fear must be caused by the threat of some considerable evil
3. It must be the threat of an imminent or inevitable evil
4. The threat or intimidation must be *contra bonos mores*
5. The moral pressure must have caused damage

UNDUE INFLUENCE (The party who seeks to set aside the contract must establish):

1. The other party obtained an influence over the party
2. This influence weakened his or her powers of resistance and rendered his will compliant
3. The other party used this influence in an unscrupulous manner to persuade him or her to agree to a transaction that
    a. was prejudicial to him or her
    b. he or she would not have concluded with normal freedom of will

State the elements for commercial bribery as held in *Extel Industrial (Pty) Ltd v Crown Mills (Pty) Ltd*.

1. A reward
2. paid or promised
3. by one party, the briber
4. to another, the agent (agent in true sense or merely a go-between)
5. who is able to exert influence over
6. a third party, the principal
7. without the principal's knowledge, and
8. for the direct or indirect benefit of the briber
9. to enter into or maintain or alter a contractual relationship
10. with the briber, his principal, associate, or subordinate.

State the requirements for *restitutio in integrum*.

1. Misrepresentation by the other party
2. Inducement
3. Intention to induce
4. Materiality

State the elements of a fraudulent misrepresentation.

1. A representation
2. which is, to the knowledge of the representor, false;
3. which the representor intended the representee to act upon;
4. which induced the representee to act; and
5. that the representee suffered damage as a result

Define misrepresentation.

A misrepresentation is generally a false statement of past or present fact (not law or opinion) made by a contractual party to another prior to the conclusion of a contract and regarding some matter or circumstance relating to the contract.

Define *dictum et promissum*.

A material statement made by the seller to the buyer during negotiations, bearing on the quality of the *res vendita* and going beyond mere praise and commendation.

State the test to determine if a restraint of trade clause is enforceable (Basson test). [5]

1. Is there an interest of one party worthy of protection?
2. If so, is that interest threatened by the conduct of the other party?
3. If so, does such interest weigh up against the interest of the other party to be economically active and productive?
4. Is there another aspect of public policy that requires that the restraint should be maintained or rejected?

Distinguish between initial impossibility of performance, supervening impossibility of performance, and prevention of performance. [10]

If a performance is objectively impossible at the time of conclusion of a contract, no obligation arises. To render performance impossible, it is not sufficient that a particular party cannot perform, that is, subjective impossibility. The impossibility must be so serious that nobody can render the performance – that is, it must be objectively impossible. An example of impossible performance is where A agrees to sell his house to B, but unbeknown to them the house has already been destroyed by a fire. Initial impossibility of performance prevents a contract from arising at all.

If, after the conclusion of the contract, performance becomes objectively impossible without the fault of the debtor, as a result of an unavoidable and unforeseen event, this is known as supervening impossibility of performance, and the obligation to perform is also, as a general rule, extinguished. The requirements for supervening impossibility of performance are:

1. the performance must be objectively impossible; and
2. the impossibility must be unavoidable by a reasonable person.

If, after the conclusion of the contract, performance on either side becomes impossible owing to the fault of either the debtor or the creditor, the contract is not terminated, but the party who rendered the performance impossible is guilty of a breach of contract known as prevention of performance. It is not necessary that the performance should be objectively impossible in order for the breach to arise; subjective impossibility will suffice.

Distinguish between suspensive conditions, resolutive conditions, suspensive time clauses, and resolutive time clauses.

SUSPENSIVE CONDITION:
Performance of an obligation (which is an uncertain future event which may or may not occur) is suspended, and enforceable only when that event has been fulfilled or has failed.

RESOLUTIVE CONDITION:

Performance of obligations should operate in full, but will come to an end if an uncertain future event does or does not happen.

SUSPENSIVE TIME CLAUSE:
Performance of obligations postponed/suspended until an event or time that is certain to arrive in the future.

RESOLUTIVE TIME CLAUSE:
Obligations terminate at a certain date or happening of a certain future event.

Briefly discuss tacit terms. [5]

A tacit term is one that the parties did not specifically agree upon, but which (without anything being said) both or all of them expected to form part of their (oral or written) agreement. It is a wordless understanding having the same legal effect as an express term.
In ascertaining whether a contract contains a tacit term, the courts often employ the officious bystander test:
The court supposes that an impartial bystander had been present when the parties concluded their agreement and had asked the parties what would happen in a situation they did not foresee and for which their express agreement did not provide. If they were to agree that the answer to the stranger's question was self-evident, they are taken to have meant to incorporate the term into their contract and to have tacitly agreed on it.

What is the parol evidence rule?

The parol evidence rule declares that where the parties intended their agreement to be fully and finally embodied in writing, evidence to contradict, vary, add to, or subtract from the terms of the writing is inadmissible.

State the different forms of breach of contract.

1. *Mora debitoris*

2. *Mora creditoris*
3. Positive malperformance
4. Repudiation
5. Prevention of performance

Discuss *mora debitoris* and *mora creditoris* and distinguish between them. [10]

MORA DEBITORIS:
Mora debitoris is the unjustifiable failure of a debtor to make timeous performance of a positive obligation that is due and enforceable and still capable of performance in spite of such failure.

Requirements:
- The debt must be due and enforceable.
- The time for performance must have been fixed, either in the contract or by a subsequent demand for performance, and the debtor must have failed to perform timeously.
- Such failure to perform on time must be without legal justification.

Mora ex re occurs where the debtor fails to perform on or before the due date expressly or impliedly stipulated by the parties in their contract.
Mora ex persona occurs where no time for performance has been stipulated, and the creditor demands that the debtor perform on or before a definite date that is reasonable in the circumstances (by means of a letter of demand, or oral demand).

MORA CREDITORIS:
Mora creditoris is a form of breach of contract by a creditor. It occurs in cases where a creditor is obliged to lend his or her cooperation, and culpably fails to do so timeously.

Requirements:
- The debtor must be under an obligation to make the performance to the creditor (the performance need not be enforceable or due, however).
- Cooperation of the creditor must be necessary for the performance by the debtor of his obligation.
- The debtor must tender performance to the creditor.
- The creditor must delay in accepting performance.
- The delay must be due to the fault of the creditor.

Define repudiation.

Repudiation is the demonstration by a party, by words or conduct, and without lawful excuse, of an unequivocal intention no longer to be bound by the contract or by any obligation forming part of the contract.

State the requirements than an innocent party must prove in order to succeed with a claim for damages. [5]

1. A breach of contract has been committed by the defendant.
2. The plaintiff has suffered financial or patrimonial loss.
3. There is a factual link between the breach and the loss.
4. As a matter of legal causation, the loss is not too remote a consequence of the breach.

Write notes on the difference between general damages and special damages. [5]

General damages are those which flow naturally and generally from the breach in question, and the law presumes that the parties contemplated them as a possible result of the breach. The guilty party is summarily held liable for general damages.

In contrast, special damages are those that do not flow naturally and generally from a specific form of breach. The guilty party is only liable for special damages in certain circumstances. The courts use two principles to determine the extent of liability in the case of special damages: the contemplation principle, and the convention principle.
In terms of the contemplation principle, liability is restricted to damages that the parties actually or reasonably must have contemplated as a probable consequence of the breach.
According to the convention principle, liability is limited to those damages that may be proved on the basis of the contract. The innocent party has to prove either an express or implied provision concerning the payment of damages.

Discuss the *exceptio non adimpleti contractus* with regard to its definition, the principles of reciprocity, how reciprocity is to be determined, as well as when the defence can be raised. Refer to case law in your answer. [10]

The *exceptio non adimpleti contractus* is a defence that can be raised in the case of a reciprocal contract. It is a remedy aimed at keeping the contract alive. It permits a party to withhold his or her own performance, and to ward off a claim for such performance until such time as the other party has either performed or tendered proper performance of his or her own obligations under the contract.

The *exceptio non adimpleti contractus* is available when two requirements are met:

1. the two performances must be reciprocal to one another
2. the other party must be obliged to perform first, or at least simultaneously with the party raising the *exceptio*. The *exceptio* may also be raised where a party has performed incompletely.

In *BK Toolings (Edms) Bpk v Scope Precision Engineering (Edms) Bpk*, the court stated that reciprocal obligations are obligations that have been created in exchange for each other.

In order to determine whether an obligation is reciprocal or not, the (express or tacit) intention of the parties must be determined by interpreting the agreement. The question to be asked is: did the parties intend to create obligations in exchange for each other?

State the requirements for a valid cession.

1. An entitlement by the cedent to dispose of the personal right
2. The capacity of the personal right to be ceded
3. A transfer agreement
4. Formalities
5. Legality
6. Absence of prejudice to the debtor

State the ways in which obligations may be terminated.

1. By performance
2. By agreement
    a. Release and waiver
    b. Novation
    c. Compromise
    d. Effluxion of time
    e. Notice
3. By law
    a. Set-off
    b. Merger
    c. Supervening impossibility of performance
    d. Prescription
    e. Insolvency
    f. Death

Write brief notes on release and waiver.

A release is an express or tacit agreement that the debtor be freed from an obligation or obligations. It therefore has the effect that the debtor need not perform. The debtor may be released in whole or in part.

The term “waiver” is often used synonymously with the concept of a release agreement. However, sometimes waiver is used to denote a unilateral act of abandoning a right or remedy that exists for the sole benefit of the party abandoning the right or remedy.

Write brief notes on novation.

A novation is an agreement to extinguish or replace one or more existing obligations with a new obligation. Accessory obligations to the original debt, such as a pledge or suretyship, are extinguished by an agreement to novate the debt.

The parties may agree to replace the debtor with a third party, provided of course that the third party agrees to such novation. Replacement of a debtor by novation is called delegation.

If an original obligation is void, a novation of the obligation will also be void. But if the novation itself is void, the original obligation will continue to exist.

Write brief notes on compromise.

Compromise is an agreement in terms of which parties settle a dispute or some uncertainty between themselves.

Compromise differs from true novation in that compromise does not require a valid old obligation to have existed.
The purpose of a compromise is to secure a final settlement of a dispute or uncertainty, sometimes as to whether there is a debt at all.

Write brief notes on set-off, and the requirements therefor.

Where two parties have claims against each other, and the requirements for set-off are met, the debts can extinguish each other. If they are not for the same amount, the smaller debt is extinguished and the larger debt is reduced by the amount of the smaller debt.
The following four requirements must be met for set-off to operate:

1. The debts must exist between the same two persons in the same capacities
2. The debts must be of the same kind or nature
3. Both debts must be due and enforceable
4. Both debts must be liquidated

PROBLEM TYPE QUESTIONS

Albert takes his motor vehicle to Dodgy Motors for a service. On his arrival, he is asked to sign a "job card" by the owner. Albert enquires why he is required to sign the "job card" and the owner explains to him that by signing he is authorising them to conduct the service on his car, which will cost R1000 . He signs the "job card" without reading it. While servicing the car, the service manager finds faults on the car (unrelated to the service) and he proceeds to do these additional repairs for a further R2000 . Albert refuses to pay for the additional repairs and argues that he did not authorise such repairs. The owner of Dodgy Motors argues that Albert is obliged to pay for the work done as the "job card" contains a contractual clause authorising Dodgy Motors to do any repairs on the motor vehicle which they deem necessary, without asking the client' s authorisation, and requiring the client to pay for such repairs. Advise Albert on whether he is liable on the contract to pay Dodgy Motors R2000 for the additional repairs. Refer to *George v Fairmead (Pty) Ltd*, *Sonap Petroleum (SA) Ltd (SA) (Pty) Ltd v Pappadogianis*, and other relevant case law in your answer. Do not apply the Consumer Protection Act to this question. [15]

The essence of this problem is the question whether Albert and the owner of Dodgy Motors have reached actual consensus or ostensible consensus. Albert will not be contractually bound to pay for the additional repairs if this requirement for a valid contract is absent.

At the outset, it must be determined whether agreement (*consensus ad idem*) as a contractual basis exists between the parties, as required in terms of the will theory. Consensus has three elements:

1. The parties must seriously intend to contract
2. The parties must be of one mind as to the material aspects of the proposed agreement (the terms and the identity of the parties to it)
3. The parties must be conscious of the fact that their minds have met

In the present case, the parties were not in agreement as to the consequences they wished to create; Albert thought that he was authorising Dodgy Motors to only service his car, while the owner of Dodgy Motors knew that the contract also allowed Dodgy Motors to conduct repairs which they deemed necessary and payable by Albert without any further authorisation from Albert. This is a mistake as to the obligations the parties wished to create and is thus a material mistake, which excludes consensus between the parties. This means that no contract could arise on the basis of the will theory.

This type of mistake can be illustrated with a number of cases:

In *George v Fairmead*, the appellant signed a hotel register without reading it. The register contained a term excluding the respondent from liability for certain acts. The appellant was unaware of this term and his mistake related to a term that he believed would not be in the contract and as such was material because it related to an aspect of performance.
In *Allen v Sixteen Stirling Investments*, the plaintiff believed he was purchasing the erf pointed out to him by the seller's agent, while the written contract that he signed indicated the correct erf, which was a completely different property. His mistake related to performance and was material.

However, the matter does not end here. A party may be held contractually liable on the basis of a supplementary ground for liability, namely the reliance theory. In this regard, the direct or indirect approach to the reliance theory may be considered.

DIRECT APPROACH:

With reference to the direct approach, contractual liability is based on the reasonable reliance that consensus has been reached, which the one contractant (the contract denier) creates in the mind of the other contractant (the contract enforcer).

According to the *Sonap* case, the direct reliance approach entails a threefold enquiry:

1. Was there a misrepresentation regarding one party's intention?
2. Who made the misrepresentation?
3. Was the other party misled by the misrepresentation, and if so, would a reasonable person have been misled?

In our question, firstly, Albert made a misrepresentation by signing the contract, that his intention is the same as that expressed in the contract.
Secondly, the owner of Dodgy Motors could actually have been misled by this misrepresentation, but a reasonable man would have taken steps to point out to Albert that the contract allows Dodgy Motors to unilaterally conduct repairs on the car, because Albert enquired about the purpose of the "job card" and the owner of Dodgy Motors misled him to believe that by signing the card he is merely authorising the service to be done. In *Sonap* the court found that the contract enforcer knew that the contract denier was acting under a mistake and was thus not misled.

In our case, Albert therefore did not create a reasonable reliance that he wished to be bound by the contract he signed.

INDIRECT APPROACH (IUSTUS ERROR DOCTRINE):

In terms of this approach, a party may escape liability to be bound to a contract if it can be established that the mistake is both:

1. Material, and
2. Reasonable

It has already been shown in the discussion above that Albert's mistake is material. It still has to be determined if his mistake was reasonable.

The contract denier's mistake will be reasonable in the following instances:

1. If caused by a misrepresentation on the part of the contract enforcer (an unlawful misrepresentation).
2. If the contract denier is not to blame for the mistake.
3. If the contract denier did not cause a reasonable belief in the contract asserter that the contract denier assented to the agreement.

Fault is not a requirement for the misrepresentation by the contract enforcer, but unlawfulness is. If the misrepresentation is a positive act it is unlawful in itself. If a legal duty to speak exists and the party has kept quiet when he ought to have spoken, an unlawful negative misrepresentation has occurred. A legal duty to speak exists in the following instances:

- Where the contract asserter knows or ought to know as a reasonable person that the other party is mistaken
- Where, prior to the conclusion of the agreement, the contract asserter created an impression directly conflicting with the provisions of the agreements, he must draw the contract denier's attention to the discrepancy (*Du Toit v Atkinson's Motors*).

In our problem, Albert enquired about the purpose of the "job card" and the owner of Dodgy Motors misled him by answering that by signing he was merely authorising the service. The owner's misrepresentation was a positive act, and was therefore unlawful. Albert's error was thus reasonable.

Applying the indirect approach to the reliance theory we do not have a valid contract. Applying the direct approach, we do not have a valid contract. Albert is not contractually liable to pay R2000 for the repairs.

X, an organiser of art exhibitions, contracted with Y for an exhibition to be held on 24 to 27 July. These dates were the only dates mentioned during negotiations. After having been pressurised by X, Y hurriedly signed a standard form contract without reading

it. The contract contained a clause permitting X to change the dates of the exhibition unilaterally. Thereafter, X changed the dates. X had no reason to believe that Y would have signed the contract if he had known of the term. Y averred that the contract was void. Will Y succeed in his attempt to have the contract set aside? Substantiate your answer and refer to relevant case law. Do not apply the Consumer Protection Act to this problem. [15]

The essence of this problem is whether X and Y have reached consensus. Y will not be contractually bound if this requirement for a valid contract is absent.

At the outset, it must be considered whether agreement (*consensus ad idem*) as a contractual basis exists between the parties, as required in terms of the will theory. Consensus has three elements:

1. The parties must seriously intend to contract
2. The parties must be of one mind as to the material aspects of the proposed agreement (the terms and the identities of the parties to it)
3. The parties must be conscious of the fact that their minds have met.

In the present case, the parties were not in agreement as to the consequences they wished to create: Y thought that the dates for the exhibition (X's performance) was fixed, while X knew that the contract allowed X to unilaterally change the dates. This is a mistake as to the obligations the parties wished to create and is thus a material mistake, which excludes consensus between the parties. This means that no contract could arise on the basis of the will theory.

This type of mistake can be illustrated with a number of cases:

In *George v Fairmead*, the appellant signed a hotel register without reading it. The register contained a clause excluding the respondent from liability for certain acts. The appellant was unaware of this term and his mistake related to a term that he believed would not be in the contract and as such was material because it related to an aspect of performance.
In *Allen v Sixteen Stirling Investments*, the plaintiff believed he was purchasing the erf pointed out to him by the seller's agent, while the written contract that he signed indicated the correct erf, which was a completely different property. His mistake related to performance and was material.

However, the matter does not end here. A party may be held contractually liable on the basis of a supplementary ground for liability, namely the reliance theory. In this regard, the direct or indirect approach to the reliance theory may be considered.

INDIRECT APPROACH (IUSTUS ERROR DOCTRINE):

In terms of this approach, a party may escape liability to be bound to a contract if it can be established that the party laboured under a mistake, which was both:

1. material and
2. reasonable.

It has already been shown that Y's mistake is material in the discussion above. It still has to be determined if Y's mistake was reasonable.

The contract denier's mistake will be reasonable in the following circumstances:

1. If caused by a misrepresentation on the part of the contract asserter (an unlawful misrepresentation)
2. If the contract denier is not to blame for the mistake
3. If the contract denier did not cause the contract asserter to have a reasonable belief that the contract denier assented to the contract.

If a legal duty to speak exists and a party has kept quiet when he ought to have spoken, that party has made an unlawful negative misrepresentation. A legal duty to speak will usually exist where:

- The asserter knows or ought to know as a reasonable person that the other party is mistaken
- Where, prior to the conclusion of the agreement the asserter created an impression directly conflicting with the provisions of the agreement, he must draw the contract denier's attention to this discrepancy (*Du Toit v Atkinson's Motors*).

Since X had no reason to believe that Y would have signed the contract had Y known of the term allowing X to change the dates of the exhibition unilaterally, X had a legal duty to point out this clause to Y. X's failure to do so renders Y's material mistake reasonable.

DIRECT APPROACH:

With reference to the direct approach, contractual liability is based on the reasonable reliance that consensus has been reached, which the one contractant (the contract denier) creates in the mind of the other contractant (the contract asserter).

According to the *Sonap* case, the direct reliance approach involves a threefold enquiry:

1. Was there a misrepresentation regarding one party's intention?
2. Who made this misrepresentation?
3. Was the other party actually misled by this misrepresentation, and if so, would a reasonable person have been misled?

By signing the contract, Y, a party to the contract, misrepresented her intention to be bound by the clause allowing X to unilaterally change the dates. X knew that the only dates mentioned during negotiations were 24 to 27 July, that Y hastily signed the contract, and that the contract had a clause allowing X to unilaterally change the dates. X was probably not actually misled by the misrepresentation by Y, and nor would a reasonable person be misled in any event. There was therefore no reasonable reliance on consensus on the part of Y.

Y is not bound by the agreement because of lack of apparent and actual consensus.

X is a keen golfer who has played at many golf tournaments over the years as an amateur. She is very well informed about the rules pertaining to her amateur status as a golfer, and knows that amateurs can only claim a maximum of R1000 in prize money at golf tournaments. X participated in a recent golfing tournament wherein she achieved a hole-in-one at the 9th hole. At this hole was an advertising board, which read: "Hole-in-one prize sponsored by Speedy Motors to the value of R90 000". The prize was parked next to this board in the form of a new car. X claimed the prize from Speedy Motors but they rejected her claim on the basis that the prize could only be claimed by professional players and not amateur players. Advise X. Refer to *Steyn v LSA Motors* and other relevant case law. [15]

This problem deals with two questions: Was there a valid offer and acceptance? Was there consensus between the parties?

Offer and acceptance:
The general rule in our law is that an advert constitutes merely an invitation to do business (*Crawley v Rex*). However, following the reasoning in *Carlill v Carbolic Smoke Ball Co*, the court in *Bloom v American Swiss Watch Co* held that the advertising of a reward might be construed as an offer to the public.
An offer may only be accepted by a person or persons to whom it was directed (*Bird v Summerville*). Although Speedy Motors intended the offer to be open only to professional players, the expressed offer was apparently open to the public. Mistake is thus also relevant.

Mistake:

At the outset, it must be determined whether agreement (*consensus ad idem*) as a contractual basis exists between the parties, as required in terms of the will theory. Consensus has three elements:

1. The parties must seriously intend to contract
2. The parties must be of one mind as to the material aspects of the proposed agreement (the terms and the identities of the parties to it)
3. The parties must be conscious of the fact that their minds have met

In our case, X and Speedy Motors were not in agreement as to the identity of the parties, and this is a material mistake, which excludes consensus based on the will theory.

However, the matter does not end here. A party may be held contractually liable on the basis of a supplementary ground for liability, namely the reliance theory. In this regard, the direct reliance approach or the indirect reliance approach may be considered. Because the facts in this case are similar to the case of *Steyn v LSA Motors* where it was held that the indirect approach couldn't be applied in instances where there is no objective appearance of agreement, only the direct approach will be considered.

DIRECT APPROACH:

With reference to the direct approach, contractual liability is based on the reasonable reliance that consensus has been reached, which the one contractant (the contract denier) creates in the mind of the other contractant (the contract enforcer). According to the *Sonap* case, the direct reliance approach entails a threefold enquiry:

1. Was there a misrepresentation regarding one party's intention?
2. Who made this misrepresentation?
3. Was the other party actually misled by the misrepresentation, and if so, would a reasonable person have been misled?

In our question, Speedy Motors made a misrepresentation regarding its intention that the offer is made only to professional players, by advertising the reward to the public. Although it may be argued that X was actually misled by the misrepresentation, it is certain that a reasonable person in X's position would not have been misled. X should know, as an experienced amateur golfer, that only certain prizes are open to amateurs. There was therefore no reasonable reliance on consensus on the part of X. X will not succeed in her claim for the prize.

S, who lives in Upington, sends P, who lives in Grahamstown, a letter by private courier in which she offers to sell him her (S's) motorcycle, a collector' s piece, for R100 000 . She states in her letter that her offer will expire on 1 February. P accepts S' s offer by letter, which he posts on 31 January. S receives the letter on 7 February and only reads it on the next day. P tenders payment of R100 000 but S refuses to accept payment. Did a valid contract arise between S and P? Substantiate your answer. [15]

The question is whether P has accepted S's offer in time and thus whether S and P have reached consensus.
Where the offeror has prescribed a time limit for acceptance, the offer lapses automatically if it is not accepted within the prescribed period.

The general rule is that a contract comes into being only when the acceptance is communicated to the mind of the offeror. The information theory, which is the general rule in our law, states that the agreement is concluded when and where the offeror learns or is informed of the acceptance – in other words, when the offeror reads the letter of acceptance.

On the other hand, the expedition theory applies to postal contracts. In terms of this theory, introduced into our law in the *Cape Explosive Works* case, a contract comes into being when and where the offeree posts the letter of acceptance. By making an offer through the post, the offeror is deemed not only to have authorised acceptance by post, but also to have waived the requirement of notification of acceptance.

The question that then arises is which theory applies. In our law, the general rule is that the information theory applies, however the expedition theory will apply if the following four criteria are met:

1. the offer is made by post or telegram
2. the postal services are operating normally
3. the offeror has not indicated a contrary intention, expressly or tacitly, and
4. the contract is a commercial one.

If any of these criteria are not met, the information theory applies.

In this question, the offer was not made by post, instead it was sent by private courier, and therefore the expedition theory does not apply. It follows that the information theory must be applied. Because S only learnt of the acceptance by P after expiry of the offer (when S read the letter on 8 February), the offer had already lapsed and no valid contract arose between the parties.

X is on her way from work and sees a white bull terrier bitch hiding in a doorway. Being an animal lover, she takes the dog home with her. The next day, she sees the following advertisement in the newspaper:

Lost in Johannesburg, on 27 May. Pedigree white bull terrier bitch with black patch over left eye. Answers to the name of Beauty.
Reward of R1000 for information leading to safe return. Tel 011 555 5555.

She realises that the dog she found matches the description given. She calls the advertiser who rushes over to be joyfully united with Beauty. In his joy, Beauty' s owner, Y, seems to forget the reward and X wishes to claim it from him. Will she be successful?
Substantiate your answer. Refer to *Bloom v American Swiss Watch Co* and other relevant case law in your answer. [10]

X will only be successful in her claim if a valid contract arose between X and Y, and this will be the case if there was a valid offer and acceptance.

The offer:
The offer was in the form of an advertisement. The general rule in our law is that an advertisement constitutes an invitation to do business (*Crawley v Rex*). However, in *Bloom v American Swiss* it was held that the advertising of a reward might be construed as an offer to the public. Offers to the public at large can be made (*Carlill v Carbolic Smoke Ball Co*).

In our case, the offer was firm, complete, clear, and certain. The offer can therefore be said to have been valid.

The providing of information by X was a valid acceptance of Y's offer:

- X's acceptance was unqualified
- X, as a member of the public to whom the offer was made, may accept (offer may only be accepted by offeree – *Bird v Summerville*)
- X's acceptance was a conscious response to the offer (he knew of the offer and could thus accept it – unlike the situation of *Bloom v American Swiss* where the plaintiff returned the item but was unaware there was a reward for doing so).

It can be concluded that a valid contract arose in this problem, because Y made a valid offer, which X validly accepted.

Y signs and delivers a written offer (including all the material terms) to Z on 1 July, for the purchase of Z' s waterfront apartment. Y's offer is for R800 000 and one of the terms of the offer states "This offer lapses on 30 August". However, whilst Z is still considering Y' s offer, Y delivers a letter to Z on 20 July, advising Z that his (Y's) offer is cancelled. Z insists that the offer is valid until 30 August, and on 25 July Z delivers a letter to Y, advising Y that he accepts Y' s offer. Has a valid contract of sale been created between Y and Z? Discuss with reference to *Brandt v Spies* and other relevant case law. [10]

Contracting parties may enter into an agreement in terms of which the offeror undertakes not to revoke his or her offer. In such cases, it is said that one party grants the other an option.

For this question, an option does not exist because there is no agreement in place that binds Y to keep his offer open until 30 August. Y has unilaterally imposed this upon himself in the offer, but it was certainly not an agreement by both parties to hold Y to keep his offer open until this date. This means that no option contract was concluded.

Y validly revokes his offer to Z on 20 July and therefore there is no offer that Z can accept. The requirements for a valid offer and acceptance for a contract have not been met, and no valid contract has thus been created.

X has been leasing a commercial property from Z for the past three years. The leas will come to an end on 31 May 2010 . On 5 March 2010 , X phones Z and offers to renew the lease for a further three years, which offer Z accepts. During this phone call, the material terms of the renewal agreement are agreed upon and X and Z further agree that the said material terms must be reduced to writing and signed by both parties. Subsequently, on 5 April 2010, X is shocked to receive a letter from Z, advising X that there will be no renewal of the lease and that X should vacate the leased property on 31 May 2010 . X and Z never reduced their oral agreement to writing. Advise X if a binding agreement with Z exists for the renewal of the lease for a further three years. Refer to *Goldblatt v Fremantle*. [15]

This question deals essentially with formalities stipulated by the parties for a valid creation of a contract. The main question is whether a formality was stipulated in

the oral agreement for the renewal of lease between the parties, that for such agreement to be valid it should be reduced to writing.

Parties to an oral agreement will often agree that their agreement should be reduced to writing, and perhaps also signed. In doing so, they may have the following intentions:

1. To have a written record of their agreement to facilitate proof of its terms. If so, the agreement is binding even if it is never reduced to writing.
2. Alternatively, they may intend that their oral agreement will not be binding upon them until it is reduced to writing and signed by them. In *Goldblatt v Fremantle*, the Appellate Division held that no contract existed because the parties intended their agreement to be concluded in writing, which also involved signing by the parties.

In the absence of contrary evidence, the law presumes that the intention of the parties was merely to facilitate proof of the terms of the agreement. The party who alleges otherwise bears the onus of proof.

In our case no binding agreement exists because the parties agreed that the oral agreement must be reduced to writing and signed, and this indicates their intention that the agreement will not be binding if this formality is not complied with.

Y let premises to X. The lease contained a clause prohibiting X from sub-letting the premises without the written consent of Y. A further clause of the lease required that any variation of the terms of the lease had to be in writing and signed by both parties. Later Y told X that he (X) could sub-let a portion of the premises. After X had sub-let a portion of the premises to a third party, Y changed his mind and informed X that both X and the sub-lessee (third party) must vacate the premises because X had breached the contract. Discuss X' s position with reference to *Sa Sentrale Ko- operatiewe Graanmaatskappy Bpk v Shifren*.

The facts correspond to a large extent with *Shifren*. The question is whether parties may orally deviate from a written agreement that contains a clause that determines that the contract may only be varied or terminated in a specific manner (non-variation clause). In such instances, the parties have actually set formalities for the amendment or termination of their contract.

In the *Shifren* case, the court decided in favour of the lessor even though the lessor apparently gave permission verbally for the amendment of a lease

agreement, which contained such a provision. The lessor was entitled to cancel the contract as a result of the lessee's breach despite the oral variation. The same results would apply to the present case.

In the *Shifren* case the court's reasoning was as follows:
Where the parties insert a clause into their contract that provides that any amendment of the contract, including the specific clause, must be in writing, they cannot later orally amend that clause or any other provision. However, if the specific clause itself is not entrenched against oral variation, the particular provision may be varied orally, with the result that thereafter the other provisions of the contract may possibly also be varied orally.

X, the owner of Tex-Mex Fried Chicken in Town A, sells her business as a running business to Y for R100 000 . The contract of sale provides that X may not conduct a similar business in Town A and Town B for a period of two years. Six months later, X opens a similar business in Town B. X uses the same recipe she used when preparing the chicken. Y seeks to enforce this clause in the contract with an interdict. It appears that, at the time of conclusion of the sale, the Tex-Mex Fried Chicken drew its customers only from Town A and that Tex-Mex chicken is not prepared according to a secret recipe. Will Y succeed? Discuss.

Y will only succeed if the agreement in restraint of trade is reasonable, but the onus of proving that it is unreasonable rests on X (the contract denier). In this regard, the Basson test should be applied to the facts of this problem.

The first question is whether Y has a protectable interest. Goodwill definitely exists as part of the running business. There is no right to a trade secret because although the recipe is useful and has economic value, it is not secret (it is public knowledge).

The second question is whether the goodwill will be threatened by the conduct of Y. The opening of a similar business in Town B directly infringes the restraint.

The third question involves a weighing up of the interests of X and Y. The business only drew its customers from Town A. This shows that the restraint goes further than necessary to protect the goodwill of the business.

The conclusion is thus that the restraint is not reasonable as between the parties. But the enquiry does not end here. The fourth question that should be

asked is whether there is any other relevant aspect of public policy which indicates that the restraint should be enforced. In our problem, there is none.

Y will not be successful in enforcing the restraint against X.

Tony, a petrol attendant, sells dagga to Samuel for R1000 . Tony delivers the dagga to Samuel but Samuel refuses to pay. Section 5 of the Drugs and Drug Trafficking Act provides that no person shall deal in dagga while section 4 prohibits possession of such substances. Section 13 makes the contravention of both sections 4 and 5 a crime. Dagga is a substance as defined in section 5. Advise Tony if he can sue Samuel for payment of R1000 or the return of the dagga. Would your advice be different if Tony was an undercover policeman who sold dagga to Samuel during a police entrapment operation? Discuss with reference to *Jajbhay v Cassim* and other relevant case law. [15]

This question involves an illegal contract of sale, which is void due to statutory illegality. The fact that the legislator has enacted a criminal sanction for a contravention is a factor that would imply that the legislator intended the contract to be void.

An illegal contract creates no obligations and it cannot be enforced. The *ex turpi* rule applies: from an illegal cause no action arises. Neither party can institute an action on the contract or claim performance from the other party. So for instance if a party has suffered damage as a result of such a contract, he or she may not claim contractual damages from the other party. A court does not have the discretion to relax this rule and there are no exceptions to it.

A party who has performed in terms of an illegal contract may however reclaim his performance, in principle, with an enrichment action. However, such restitution will be prevented where the *par delictum* rule applies. According to the *par delictum* rule: where two parties are equally morally guilty, the one who is in possession is in the stronger position. If this is the case, restitution in terms of an enrichment action is prevented.

In our case, Tony is precluded from instituting any contractual claim for R1000 from Samuel because of the *ex turpi* rule, and also from an enrichment claim because of the *par delictum* rule.

The situation might differ if Tony was an undercover cop. In such a case, Tony would not be equally morally guilty (*Minister of Justice v Van Heerden*) and so the *par delictum* rule would not apply.

In *Jajbhay v Cassim*, the Appellate Division held that the *par delictum* rule may be relaxed in appropriate circumstances in order to justice "between man and man" if it would be in the interests of public policy.

X hands in her shocking pink suede jacket at the dry-cleaner. Y hands her a receipt. On the back of the receipt is a clause excluding Y' s liability in the event of negligent damage to or theft of any goods handed in for dry-cleaning. The same words appear on a big notice board in the shop, which is clearly visible. When X fetches her jacket, she is dismayed to discover that the dry-cleaning process has changed the jacket' s colour. Is she bound by the exemption clause? Discuss briefly. [5]

With so-called ticket contracts, one of the parties issues a ticket on which certain contractual terms appear. The question is whether the other party may be held bound to such terms where that party has not signed the ticket in question. Our courts use a three-legged test:

1. Did the person know there was writing on the ticket?
2. Did he know that the writing referred to terms of the contract?

If both answered in the affirmative, the terms form part of the contract. If either answered negative, a further question follows:

3. Did the party who issued the ticket take reasonable steps to bring the reference to the terms to the attention of the other party?

In the present case, X will probably be held bound because of the notice board that also refers to the contractual terms.

Andy and Craig conclude a contract wherein Andy agrees to paint Craig' s office block by 31 August, and Craig agrees to pay Andy R10 000 upon completion of the work. When 80 % of the work is completed Andy suddenly falls ill and he is unable to complete the job by 31 August. Craig refuses to pay Andy any money for his

(Andy's) services rendered, as Craig believes that Andy has breached the contract by not completing the work. Craig hires another contractor at an amount of R3000 to complete the job.
Craig does not incur any other costs to complete the job, neither does his business make any losses. Advise Andy as to what amount (if any) he may recover from Craig for the services that he rendered, and on what basis. Discuss with reference to *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* and other relevant case law. [15]

This contract is reciprocal in nature. Andy has rendered defective performance and the issue is whether Craig has to compensate Andy for the work that has already been done.

This question deals with the *exceptio non adimpleti contractus*. The *exceptio* is a defence that can be raised in the case of a reciprocal contract, where the performances due on either side are promised in exchange for one another. It is a remedy that permits a party to withhold their performance and ward off a claim for such performance until such time as the other party has either performed or tendered performance of their obligations.

Where a party who has to perform first has only performed part of its obligations or has rendered defective performance, that party is in principle not entitled to claim counter-performance until such time as he has performed in full. In practice, the innocent party often accepts part-performance and starts using the performance. This sometimes leaves the breaching party in the unfair position that it may be impractical or impossible to make full performance, but any claim for counter-performance can be defended by the other party relying on the *exceptio*.

As a result, the courts have exercised a discretion to relax the principle of reciprocity and order the party making use of the defective or incomplete performance to pay a reduced amount to the party in breach.
In *BK Tooling*, the Appellate Division confirmed this, and held that the courts have an equitable discretion to award a reduced contract price, depending on the nature of the defect, and the cost of repair, replacement, or substitute performance. The onus to prove the amount of reduction is on the party in breach claiming the reduced price. The plaintiff must allege and prove:

- that the other party is using his performance
- the cost of remedying defects
- that it would be equitable to award some remuneration despite breach
- that the circumstances are such that the court should exercise its discretion

Based on the ruling in *BK Tooling*, Andy is entitled to be compensated by Craig because:

1. Craig is utilising the defective performance
2. It would be equitable as Andy has completed most of the work
3. The counter-performance ought to be reduced by R3000 (the amount it cost to complete the job)

In the circumstances, Andy is entitled to receive R7000 from Craig, which represents the difference between the contract price and the cost to complete the job.

On 1 June M and Q conclude a contract whereby M undertakes to manufacture and install kitchen cupboards in Q' s home for R50 00 . The parties agree that the price will be paid as soon as the kitchen cupboards are installed, but they do not determine a date for the completion of the work. M, however, informs Q during the negotiations that she has some other work to complete and that she will attend to the kitchen cupboards as soon as possible. Eight months has lapsed since the contract was concluded and Q has not heard from M. Q runs out of patience and hires W to manufacture and install the same kitchen cupboards for R60 000. After W has completed the job, M turns up to do the work. Q claims R10 000 damages from M, but M institutes a counterclaim for R30 000 from Q for her loss of profit. Who will succeed in this claim? Discuss.

This question deals with damages for breach of contract. In order to determine who will succeed in the claim for damages, we must ascertain which party committed the breach.

A plaintiff who wishes to claim damages for breach of contract must prove the following:

1. A breach of contract has been committed by the defendant
2. The plaintiff has suffered financial or patrimonial loss
3. There is a factual causal link between the breach and the loss
4. As a matter of legal causation, the loss is not too remote a consequence of the breach.

Did M or Q breach the contract?

M could possibly be in breach in the form of *mora debitoris*. *Mora debitoris* is the unjustifiable failure of a debtor to make timeous performance of a positive obligation that is due and enforceable, and still capable of performance in spite of such failure.

Because performance has become impossible, it is not capable of performance. Also, no date was stipulated for performance, nor did Q demand performance, so M could neither be in *mora ex re* nor *mora ex persona* respectively.
M has not committed a breach of contract.

Q, by hiring W to manufacture the cupboards has committed two forms of breach: repudiation, and prevention of performance. A party commits the breach of repudiation when, by words or conduct, and without lawful excuse, he manifests an unequivocal intention no longer to be bound by the contract or any obligation forming a part thereof.
Prevention of performance is a breach whereby, after conclusion of the contract, one of the parties, owing to their fault, causes performance to become impossible.

M will therefore be able to claim damages from Q successfully, because he will be able to prove that Q committed a breach of contract. The aim of damages is to place the innocent party in their fulfilment position, that is, the position they would have been in had there been no breach. M's claim for loss of profit will probably be successful.

X contracts with Y for the latter (Y) to build and fit a security gate for the entrance of her (X's) home. Y builds the gate and fits it with an electric motor, which is activated with a remote control. X is satisfied with the work and pays Y the contractual amount agreed upon. A week later, the gate gets stuck while it is halfway open as a result of defective materials used to build the gate. When X attempts to physically move the gate to close it fully, she suffers such severe damage to her left knee that she has to have a knee operation. Her medical costs are R20 000 . The costs of repairing the gate amount to R15 000 . X wants to claim both medical costs as well as the cost of repairing the gate from Y. Advise X if she will be successful with her claim. Refer to *Shatz Investments (Pty) Ltd v Kalovymas; Holmdene Brickworks (Pty) Ltd v Roberts Construction Co*, and other relevant case law in your answer. [15]

This question deals with a claim for damages for breach of contract, and specifically, the element of legal causation regarding special damages and general damages.

A plaintiff who wishes to claim damages for breach of contract must prove:

1. A breach of contract has been committed by the defendant
2. The plaintiff has suffered financial or patrimonial loss

3. There is a factual causal link between the breach and the loss
4. The loss is not too remote a consequence of the breach (legal causation).

Y has committed a breach of contract in the form of positive malperformance (the defective materials used to build the gate).

In the law of contract, the approach to remoteness of consequences from breach (legal causation) has been traditionally based on a distinction between general and special damages. The distinction between general damages and special damages was stated in *Holmdene Brickworks*: general damages are those damages that flow naturally and generally from the kind of breach in question and which the law presumes the parties contemplated as a probable result of the breach; special damages, on the other hand, are presumed to be too remote unless exceptional circumstances are present.

X may claim the cost of repairing the gate as general damages.
If X wants to succeed in the claim for medical costs as special damages, X must prove that:

1. The damages were actually foreseen or reasonably foreseeable at the time of entry into the contract (the contemplation principle); and
2. The parties can be taken to have agreed that there would be liability for damages arising from special circumstances (the convention principle).

PVL3702 ASSIGNMENT 01 QUESTION: 2023 (SEMESTER 1)

UNIQUE NUMBER: 618220

ASSIGNMENT 01 QUESTION:

Carol, an owner of an exclusive bicycle shop advertised a special limited-edition bicycle for sale, and invited the public to make offers for the bicycle. Jane and Portia were among many people who submitted written offers for the bicycle. Jane's offer was for R150 000, and Portia's offer was for R190 000. Although Carol intended to accept Portia's offer, she erroneously wrote a letter to Jane, wherein she accepted Jane's offer. Jane believes that an enforceable contract was formed but Carol denies this. Apply the direct reliance theory and advise if a legally binding contract was concluded between Carol and Jane. Discuss fully and refer to case law in your answer. Do not apply the Consumer Protection Act 68 of 2008. [20]

ANSWER

According to the direct application of the reliance theory, contractual liability is based on the reasonable reliance that consensus has been reached which the one contractant (contract denier) creates in the mind of the other contractant (contract enforcer) and creates in his mind the other consensus (Contract enforcer).

In the case of **Constantia Insurance Co Ltd v Compusource (Pty) Ltd 2005 (4) SA 345 (SCA)**,[1] the appellant (Constantia) is an insurance company.

It issued two PDL insurance policies to the respondent (Composource) through the agency of an insurance broker, Legal Protection Services (LPS). The Issue in this case was if the respondent was liable to the appellant for the insurance premiums?

[1] *Constantia Insurance Co Ltd v Compusource (Pty) Ltd* 2005 (4) SA 345 (SCA).

The SCA held that the true issue was not one of misrepresentation by omission but one of dissensus.and concluded that the respondent could not be held liable for the provisions of a clause to which its representative did not and could not reasonably have been thought to agree.

In **Kok v Osborne**,[2] the defendant believed that he was contracting with the plaintiff and another party jointly, but the reality was that he was only entering into a contract with the plaintiff alone. This error in persona meant that the defendant was mistaken as to the party or parties with whom he was contracting. The court held that such a mistake was material. Based on the facts, the court found that the conduct of the defendant was reasonable. Accordingly, the court found that the defendant's mistake amounted to a iustus error, which therefore rendered the contract void.

Direct reliance approach:

The questions will determine the test of direct application of the reliance theory:

- Was there a misrepresentation with the party's intention?
- Who made such a misrepresentation?
- Was the other party misled, and if so, would a responsible person also have been misled?

In this set of facts there is a mistake relating to the identity of the parties with whom Carol intended to contract with (an error in persona). Carol's mistake was material because she inadvertently accepted the offer of one party (Jane), whereas she intended to accept the offer of a completely different party (Portia).

Carol misrepresented her actual intention to contract with Portia by accepting Jane's offer. Jane was actually misled by Carol's misrepresentation as to Carol's intention to contract with Jane. A reasonable man would also have been misled by this misrepresentation of Carol.

Jane's reliance was therefore reasonable.

Carol, a party to the apparent contract, made a misrepresentation regarding her own true intention. By accepting Jane's offer, she made a misrepresentation that she wished to contract with Jane. Jane was actually misled by this misrepresentation and a reasonable man in Jane's position would also have been misled, because there is no indication that something was amiss and that Carol actually wished to contract with someone else.

Identifying the Problem

The facts seemingly indicate that Carol and Jane may not have reached actual consensus based on the will theory because Carol sent the acceptance letter to the wrong person. Carol sent the letter of acceptance to Jane by mistake as it intended to contract with another party. The question thus deals with error, and the

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2 Kok v Osborne 1993 (4) SA 788 (SE).

application of the iustus error doctrine. The iustus error doctrine has two requirements: the mistake must be material (an application of the will theory) and reasonable (an indirect application of the reliance theory). Because Carol as the contract denier believes that a valid contract was not concluded, it must prove both of these requirements for the agreement to be declared null and void. If it fails to do so, then the contract will be valid and legally binding.

Applying the Law to the facts

Carol sent the letter of acceptance to Jane by mistake as it intended to contract with another party. The question is thus whether this mistake on the part of Jane is both material and reasonable in terms of the iustus error doctrine.

The mistake on the part of Carol relates to an error in persona. With this type of error, where a party intends to accept the offer of one party, but mistakenly accepts the offer another party, such an error is usually material.[3] Therefore, the judgments in Osborne provides judicial support to reason that the mistake made by Carol was material.[4]

Firstly, Carol's mistake was not caused by a misrepresentation from Jane. Secondly, Carol is to blame for the mistake as it addressed and sent the letter of acceptance to the wrong person. Thirdly, Carol, instilled a reasonable belief in the mind of Jane that the company was consenting to the contract. Carol created this reasonable belief when it sent the letter of acceptance to Jane, who read it. Therefore, the mistake made by Carol was not reasonable.

The giving of appropriate advice

Carol made a misrepresentation to Jane that she wanted to conclude a contract with Jane by accepting Jane's offer and this led Jane to reasonably believe that consensus had been reached between the parties.
Jane's reliance is therefore reasonable and Carol is bound by the contract.

3 Dale Hutchison and Chris Pretorius (eds), The Law of Contract in South Africa (Oxford 2017) 88.
4 Dale Hutchison and Chris Pretorius (eds), The Law of Contract in South Africa (Oxford 2017) 14-16.

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2. Kok v Osborne 1993 (4) SA 788 (SE).

PVL3702 Assignment 2 (QUIZ)

Semester 1 2023 (618228)

QUESTION 1

Gary points a loaded gun at Pete, and orders him to sign a written contract. Gary explains that the document is for the sale of Pete's car to him (Gary), at a price of R50 000 which is far below the market value of the car. Pete, fearing for his life, signs the document. To establish an appropriate cause of action to have the contract set aside, which of the following is

NOT necessary for Pete to prove?

1. That Pete had a reasonable fear.

2. That the threat weakened Pete's power of resistance and rendered his will compliant.

3. That there was a threat of an imminent evil.

4. That the threat was contra bonos mores.

5. That the pressure Gary used caused damage.

Discussion

The requirements for duress (Hutchison and Pretorius Contract 136-140) are relevant to this question, as it appears that Pete did not freely conclude the contract, but through fear for his life. Options 1, 3, 4 and 5 are all requirements that must be present to prove a cause of action based on duress (Hutchison and Pretorius Contract 137). Option 2 is not a requirement to prove duress. Instead it has a similar wording to a requirement, which is necessary to prove undue influence (Hutchison and Pretorius Contract 141-142).

QUESTION 2

X has a watch that Y likes. X offers to sell her watch to Y for R1 000, and X and Y agree that X's offer will be open for acceptance until 1 June. This is a case of

1. a pre-emption formed unilaterally.

2. an option formed bilaterally.

3. an option formed unilaterally.

4. neither an option, nor a pre-emption.

5. a pre-emption formed bilaterally.

Discussion

From the facts of this problem it is clear that the parties have entered into an agreement to hold the offer open. All contracts are bilateral juristic acts (Hutchison and Pretorius Contract 6).

An option is a contract to keep an offer open for acceptance for a certain period of time (Eiselen GTS et al Law of contract. Only study guide for PVL3702 (University of South Africa 2012) 26). Clearly there is an agreement between the parties to keep X's offer open for acceptance until 1 June. Therefore option 2 is correct.

In a pre-emption agreement the prospective seller undertakes to give a prospective buyer preference in the event of deciding to sell the property (Eiselen et al Study Guide 31). Clearly X and Y did not conclude such an agreement relating to the watch.

QUESTION 3

Which statement is INCORRECT?

1. The obligations that arise from contract, delict, and unjustified enrichment, are always imposed by law, irrespective of the will of the parties.

2. The law of contract, delict, and unjustified enrichment, all relate to the law of obligations.

3. Breach of contract and a delict are very similar, in that they both constitute civil wrongs and, in appropriate circumstances, give rise to a duty to pay damages.

4. Sometimes, concurrent contractual and delictual liability can arise, so that the plaintiff may sue on either basis.

5. In the absence of a valid contract, an unjustified enrichment claim may arise when there is a transfer of wealth from one person's estate to another person's estate, without a good legal ground or cause for this shift.

Discussion

Options 2, 3, 4 and 5 are all correct (Hutchison and Pretorius (eds) The law of Contract in South Africa (Oxford University Press Southern Africa 2012) 8-9). Option 1 is incorrect (Hutchison and Pretorius Contract 8).

QUESTION 4

Which one of the following statements regarding tacit terms is INCORRECT?

1. The courts often employ the officious bystander test in determining whether a contract contains a tacit term.

2. A tacit term will only be read into a contract if it does not conflict any of the unambiguous express terms of the contract.

3. A tacit term will only be read into a contract if it is necessary in a business sense to give efficacy to the contract.

4. A tacit term is specifically agreed to by the parties and can only form part of a written contract.

5. Trade usage is a fertile field for the importation of tacit terms.

Option 4 is incorrect. (Hutchison and Pretorius Contract)The rest is correct (Hutchison and Pretorius Contract 247-248).

QUESTION 5

X, an organiser of art exhibitions, contracted with Y for an exhibition to be held on 24 to 27 July. These dates were the only dates mentioned during the negotiations. After having been pressurized by X, Y hurriedly signed the standard form contract without reading it. The contract contained a clause permitting X to change the dates of the exhibition unilaterally.

X was aware of this clause, but Y was not. Thereafter, X changed the dates. X had no reason to believe that Y would have signed the contract if he had known of the term. This is a case of

1. an error in persona.

2. a material error.

3. an error in negotio.

4. a common error.

5. a material error and an error in negotio.

Discussion

In the present case, the parties were not in agreement as to the consequences they wished to create: Y thought that the dates for the exhibition (X's performance) was fixed, while X knew that the contract allowed X to unilaterally change the dates. This is a mistake as to the obligations the parties wished to create and is thus a material mistake, which excludes consensus between the parties. This means that no contract could arise on the basis of the will theory.

QUESTION 6

P buys an erf from S for R300 000. During the negotiations S points a different erf out to P than the one described in the written contract of sale for R300 000. What type of mistake does P make?

1. Error in negotio.

2. Error in substantia.

3. Error in corpore.

4. Error in persona.

5. Error in motive.

Discussion

This error relates to the identity of the erf which has been sold. See Study Guide 54.

QUESTION 7

Portia and Lucas are engaged and are living together. They want to purchase Jerome's car. Jerome has never met Portia. Jerome offers to sell his car to Lucas for R100 000. Lucas and Portia accept Jerome's offer. Which statement is CORRECT?

1. Only Lucas could accept the offer, because the acceptance must be done by the person to whom the offer was made.

2. Either Lucas or Portia could accept the offer as they are engaged.

3. The acceptance by Lucas was unqualified, therefore the acceptance was valid.

4. A valid contract has been concluded, because Lucas is one of the parties that accepted the offer.

5. The acceptance by Lucas was a conscious response to the offer, therefore the acceptance was valid.

The answer is option 1, since an offer can only be accepted by the person to whom it was made (Bird v Summerville 1961 (3) SA 194 (A)). In this question the offer was made to Lucas.

Therefore, only Lucas can accept the offer. This also automatically excludes options 2 and 4. With regard to option 3 Portia and Lucas are making a counter-offer because their acceptance changes the terms of the offer. They are replacing Lucas with Lucas and Portia as purchasers (Hutchison and Pretorius Contract 55-56).

QUESTION 8

X inherits a watch which Y is interested in buying. X and Y believe that the watch is a genuine Rolex and both know of each other's belief. When they conclude the contract, Y tells X that he is only buying the watch because it is a Rolex. However, it turns out to be only an imitation. This is most probably a case of a

1. resolutive condition.
2. material error in motive.
3. suspensive condition.
4. **common mistake.**
5. resolutive condition and a common mistake.

Option 4 is correct. Parties may decide to conclude a contract on the supposition or assumption, that a certain state of affairs exists or existed. The supposition or assumption must be shared by both parties in order to form the basis for concluding the contract. Based on the facts above, the basis for concluding the contract which was shared by both parties was that the watch was a Rolex . Since the supposition turned out to be false, the contract is void. See Hutchison and Pretorius Contract 262.

Option 2 is incorrect. There was no error with regard to Y's intention (error in motive), and both parties shared the understanding that a state of affairs was present, that being that the watch was a Rolex. If only one of the parties assumed that the watch was a Rolex, then such a mistake by one of the parties may have been considered legally irrelevant and perhaps tantamount to an error in motive (Hutchison and Pretorius Contract 89, 262). However, given that both parties shared this assumption, this is not a case of error in motive. See Hutchison and Pretorius Contract 262.

Options 1 and 3 are incorrect. There is a difference between a supposition and conditions such as a resolutive and suspensive conditions. The difference is that a condition relates to a future uncertain event, whereas a supposition pertains to a past or present state of affairs. The basis for concluding the contract being that the watch is a Rolex did not relate to a future uncertain event. Therefore options 1 and 3 are incorrect. See Hutchison and Pretorius Contract 260, 262.

It follows that if option 1 is incorrect, then option 5 is also incorrect

QUESTION 9

X makes a written offer to Y to purchase Y's Rolex watch. X sends the written offer by post to Y. Y reads the offer on 13 May and drafts an acceptance on 14 May. Y posts his written acceptance on 15 May to X. X receives the acceptance on 17 May and reads it on 18 May. When was the contract concluded?

1. 13 May.
2. 14 May.
3. **15 May.**
4. 17 May.
5. 18 May.

Discussion

The information theory is the general rule in our law and states that the contract is concluded when and where the offeror learns or is informed of the acceptance of his or her offer. The offeror may determine expressly or tacitly otherwise in the offer. In postal contracts the expedition theory applies and the contract is concluded as soon as the acceptance has been posted. The law assumes (a fiction thus) from the making of an offer by post that the offeror has authorised acceptance by post, and that he or she also has waived the requirement of notification of acceptance. See the discussion in Hutchison and Pretorius Contract 56 – 60.

Here the offer by X was sent by post and the expedition theory thus applies. The contract was thus concluded on the date Y posted his acceptance, which is 15 May 2015.

QUESTION 10

If commercial bribery exists, the agreement between the briber and the principal is

1. voidable.
2. **void.**
3. void and voidable.
4. neither void nor voidable.
5. always an agreement in restraint of trade.

Discussion

See Hutchison and Pretorius Contract 56-61.

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PVL3702 ASSIGNMENT 01 QUESTION: 2023 (SEMESTER 2)

UNIQUE NUMBER: 698664

ASSIGNMENT 01 QUESTION:

Carol, an owner of an exclusive bicycle shop advertised a special limited-edition bicycle for sale, and invited the public to make offers for the bicycle. Jane and Portia were among many people who submitted written offers for the bicycle. Jane's offer was for R150 000, and Portia's offer was for R190 000. Although Carol intended to accept Portia's offer, she erroneously wrote a letter to Jane, wherein she accepted Jane's offer. Jane believes that an enforceable contract was concluded but Carol denies this. Apply the iustus error doctrine and advise if a legally binding contract was concluded between Carol and Jane. Discuss fully and refer to case law in your answer. Do not apply the Consumer Protection Act 68 of 2008.

[20]

ANSWER

In *Allen v Sixteen Stirling Investments (Pty) Ltd*,[1] the plaintiff believed he was buying the property shown to him by the seller's agent when the written contract he signed stated the real property, which was a completely different one property traded. His error was performance-related and significant. In this case, there was also a material error, which is a factual error. Based on the facts, the court also concluded that the plaintiff's error was also well founded. Accordingly, the court upheld the legal principle doctrine in favor of the plaintiff and ruled that the contract was void.

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1 *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 (4) SA 164 (D).

In ***Kok v Osborne***,[2] the defendant believed that he was contracting with the plaintiff and another party jointly, but the reality was that he was only entering into a contract with the plaintiff alone. This error in persona meant that the defendant was mistaken as to the party or parties with whom he was contracting. The court held that such a mistake was material. Based on the facts, the court found that the conduct of the defendant was reasonable. Accordingly, the court found that the defendant's mistake amounted to a iustus error, which therefore rendered the contract void.

The relevant pages where the Allen and Osborne cases are discussed in the content and footnotes in the textbook.[3]

Identifying the problem

The facts seemingly indicate that Carol and Jane may not have reached actual consensus based on the will theory because Carol sent the acceptance letter to the wrong person. Carol sent the letter of acceptance to Jane by mistake as it intended to contract with another party. The question thus deals with error, and the application of the iustus error doctrine. The iustus error doctrine has two requirements: the mistake must be material (an application of the will theory) and reasonable (an indirect application of the reliance theory). Because Carol as the contract denier believes that a valid contract was not concluded, it must prove both of these requirements for the agreement to be declared null and void. If it fails to do so, then the contract will be valid and legally binding.

Applying the Law to the facts

Carol sent the letter of acceptance to Jane by mistake as it intended to contract with another party. The question is thus whether this mistake on the part of Carol is both material and reasonable in terms of the iustus error doctrine.

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2 *Kok v Osborne* 1993 (4) SA 788 (SE).

3 Dale Hutchison and Chris Pretorius (eds*), The Law of Contract in South Africa* (Oxford 2017) 481 and 490.

The mistake on the part of Carol relates to an error in persona. With this type of error, where a party intends to accept the offer of one party, but mistakenly accepts the offer another party, such an error is usually material.[4] Therefore, the judgments in Osborne provides judicial support to reason that the mistake made by Carol was material.[5]

In National and Overseas Distributors Corporation (Pty) Ltd v Potato Board,[6] a company incorrectly sent a letter of acceptance to the wrong offeror, as it intended to accept the offer from a different offeror, and such a mistake was considered to be material.[7]

Therefore, the judgments in Potato Board and Osborne provides judicial support to reason that the mistake made by Carol was material.

Having established that there was a material mistake, based on the iustus error doctrine , we have to determine if the mistake Carol made was reasonable. There are usually three instances when a material mistake may be considered to be reasonable.[8]

The first is where the mistake is caused by a misrepresentation on the part of the contract asserter (Carol). The second is where the contract denier (Jane) is not to blame for his or her mistake. And the third is where the contract denier (Jane) did not cause a reasonable belief in the mind of the contract asserter (Carol) that the contract denier (Jane) was consenting to the agreement.

Firstly, Carol's mistake was not caused by a misrepresentation from Jane. Secondly, Carol is to blame for the mistake as it addressed and sent the letter of acceptance to the wrong person. Thirdly, Carol, instilled a reasonable belief in the mind of Jane that the company was consenting to the contract. Carol created this reasonable belief when it sent the letter of acceptance to Jane, who read it. Therefore, the mistake made by Carol was not reasonable.

The above reasoning is consistent with the Court's finding in the Potato Board case. The facts set out in the order are similar to those in the Potato Board case.[9] In the Potato Board case, the defendant conducted a tender process for the construction of a steel shed. After

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4 Dale Hutchison and Chris Pretorius (eds), *The Law of Contract in South Africa* (Oxford 2017) 88.

5 Dale Hutchison and Chris Pretorius (eds), *The Law of Contract in South Africa* (Oxford 2017) 14-16.

6 *In National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A)

7 Dale Hutchison and Chris Pretorius (eds), *The Law of Contract in South Africa* (Oxford 2017) 88 (with footnote 33).

8 Dale Hutchison and Chris Pretorius (eds), The Law of Contract in South Africa (Oxford 2017) 104-106.

9 Dale Hutchison and Chris Pretorius (eds), The Law of Contract in South Africa (Oxford 2017) 102).

examining the submitted offers, the defendant then sent a letter of acceptance to the complainant for the erection of the shed. The complainant was subsequently informed by the defendant that this letter was based on an administrative error and that it actually intended to accept another party's offer.

The court ruled that a legally binding contract was concluded on the basis of the consent of the parties (declaration theory). Important to the assignment issue, however, was that the court further argued that if the defendant (as a contract denier) had invoked the justus error defense to avoid liability under the contract, it would have failed because the error would not have been reasonable.[10]

The giving of appropriate advice

Based on the application of the Iustus Error Doctrine, Carol’s error is material but not reasonable. This means that one of the conditions for the success of this defense in favor of Carol is not met. An enforceable contract was therefore concluded between Carol and Jane.

[10] Dale Hutchison and Chris Pretorius (eds), The Law of Contract in South Africa (Oxford 2017) 102 and 109.

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